# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1931 1932

No. 404 3

AMERICAN SURETY COMPANY OF NEW YORK,
PETITIONER,

*vs.*

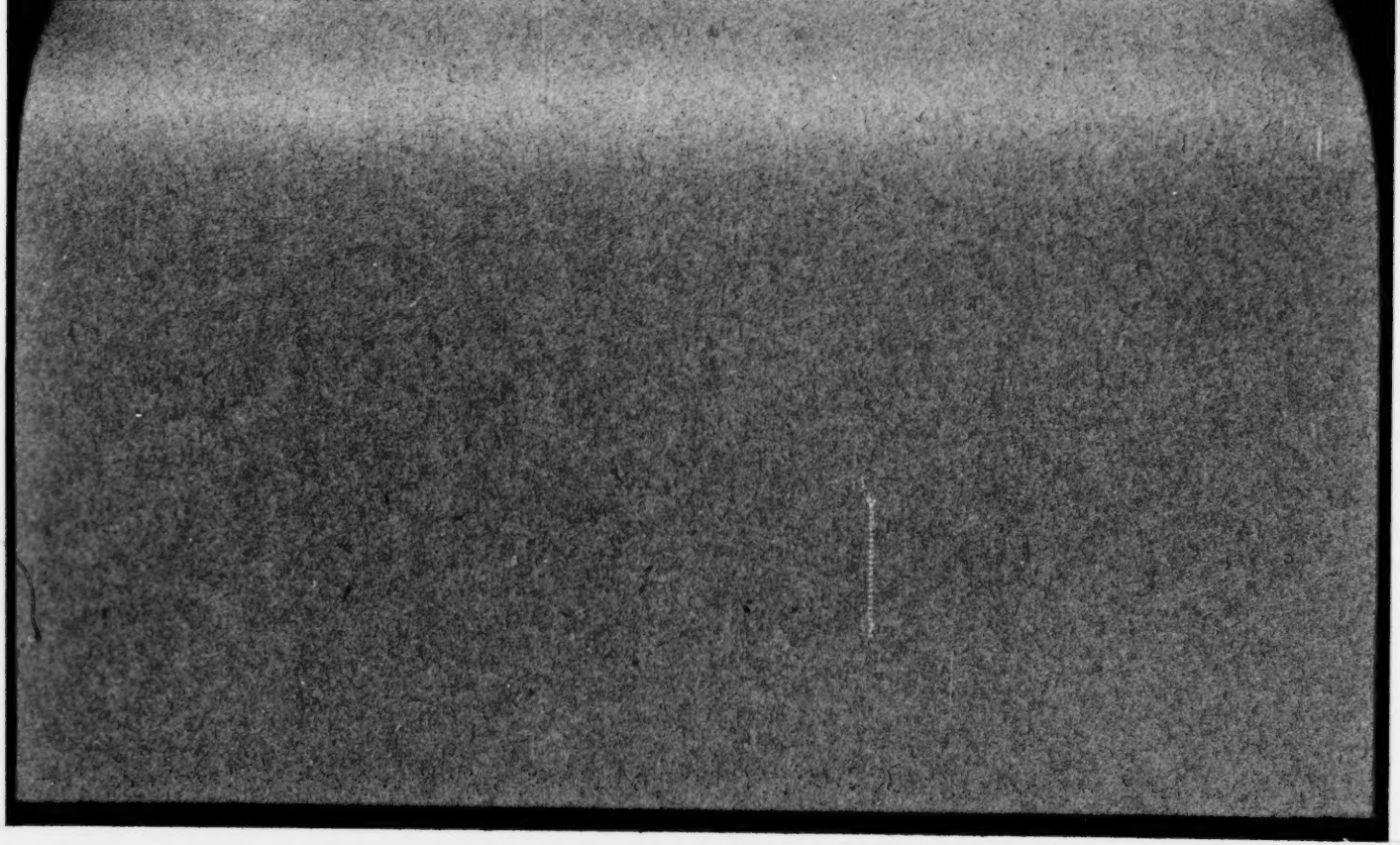
VIVIAN F. BALDWIN AND E. R. BALDWIN

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IDAHO

PETITION FOR CERTIORARI FILED OCTOBER 30, 1931

CERTIORARI GRANTED APRIL 25, 1932

(36,308)



# (36,308)

# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1931

# No. 494

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AMERICAN SURETY COMPANY OF NEW YORK, PETITIONER,

*vs.*

VIVIAN F. BALDWIN AND E. R. BALDWIN

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IDAHO

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 4, 1932

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## Judgment.

1

IN THE

# District Court of the Third Judicial District of the State of Idaho

IN AND FOR THE COUNTY OF ADA.

VIVIAN F. BALDWIN and E. R. BALDWIN,
Plaintiffs,

*vs.*

2

SINGER SEWING MACHINE COMPANY, a corporation, and ED. ANDERSON,
Defendants.

The plaintiffs in the above entitled cause having heretofore filed their complaint herein and the defendants and each of them having thereafter appeared and filed respectively their separate answers to said complaint; and thereafter, on the 3
21st day of May, 1928, said cause having come on for trial of the issues so made up; and the jury having been duly impanelled and sworn to try said cause, and thereupon plaintiffs and defendants having offered evidence both oral and documentary in support of their respective allegations, and the said jury having been duly instructed by said court and having heard argument by the respective counsel of record of said parties herein, and having thereupon retired to consider of their verdict;

*Judgment.*

And the said jury having thereafter returned to court and having returned in said cause their verdict, which was duly read and filed herein, in the following language to-wit:

> We, the jury, in the above entitled cause find for the plaintiffs, Vivian F. Baldwin and E. R. Baldwin and against the defendants, Singer Sewing Machine Company, a corporation, and Ed. Anderson in the sum of $19,500.00.
>
> J. E. BURNETT,
> Foreman.

No. 11860—Filed 5:22 P. M. May 25, 1928.

STEPHEN UTTER,
Clerk.

By: B. CLYDE EAGLESON,
Deputy.

Now, THEREFORE, it is hereby ordered, adjudged and decreed that the said plaintiffs, Vivian F. Baldwin and E. R. Baldwin, do have and recover from the said defendants, Singer Sewing Machine Company, a corporation, and Ed. Anderson, the sum of Nineteen Thousand Five Hundred ($19,500.00) Dollars together with plaintiffs' costs in this behalf laid out and expended, which are hereby taxed at the sum of $ .

CLINTON H. HARTSON,
District Judge.

(Endorsed: Filed May 31st, 1928.)

7

## Notice of Appeal.

[TITLE OF COURT AND CAUSE.]

*To Vivian F. Baldwin and E. R. Baldwin, Plaintiffs, James F. Ailshie, Jr., and J. R. Smead, their attorneys, and to Stephen Utter, Clerk of the above entitled Court:*

You and each of you will please take notice, that the defendants, Singer Sewing Machine Company, a corporation, and Ed. Anderson, hereby appeal to the Supreme Court of the State of 8
Idaho, from that certain judgment entered in the above entitled action on the 31st day of May, 1928, for the sum of $19,573.70, against the defendants, and each of them, and from the whole thereof.

Dated August 27, 1928.

MARTIN & MARTIN,
and
H. B. WALKER,
Attorneys for Defendants.
Residence: Boise, Idaho. 9

(Duly served.)

(Endorsed: Filed August 27th, 1928.)

10

## Undertaking on Appeal.

[TITLE OF COURT AND CAUSE.]

Whereas the defendants, Singer Sewing Machine Company, a corporation, and Ed. Anderson, in the above entitled action have appealed to the Supreme Court of the State of Idaho from that certain judgment made and entered into in the above entitled case on the 31st day of May, 1928, in favor of the plaintiffs and against these defendants, and each of them, in said above entitled
11 action in the above entitled court, said judgment being in favor of said plaintiffs in the sum of Nineteen Thousand Five Hundred Seventy-three and 70/100 ($19,573.70) Dollars, and against said defendants and each of them:

Now, THEREFORE, the American Surety Company of New York, a foreign corporation authorized to, and doing business in the State of Idaho, in consideration of the premises and of such appeal, does hereby undertake and promise on the part of said appellants, Singer Sewing Machine
12 Company, a corporation, and Ed. Anderson, that the said appellants will pay all damages and costs which may be awarded against them on appeal or on dismissal thereof not exceeding Three Hundred ($300.00) Dollars, to which amount the said American Surety Company acknowledges itself duly bound.

IN WITNESS WHEREOF, the said American Surety Company has caused its name and seal to

be attached hereto by its proper officers and agents at Boise, Idaho, this 28th day of August, 1928.

AMERICAN SURETY COMPANY OF NEW YORK,

By HOWARD E. STEIN,
Attorney-in-Fact.

Countersigned:
HOWARD E. STEIN,
Agent at Boise, Idaho.

Countersigned:
RICHARD & HAGA
O. O. HAGA.

(SEAL)

(Endorsed: Filed August 29th, 1928.)

16

## Undertaking on Appeal.

IN THE

DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO,

IN AND FOR THE COUNTY OF ADA.

VIVIAN F. BALDWIN and E. R. BALDWIN,
Plaintiffs,

17

*vs.*

SINGER SEWING MACHINE COMPANY, a corporation, and ED. ANDERSON,
Defendants.

Whereas, the defendant, Singer Sewing Machine Company, a corporation, in the above entitled action has appealed to the Supreme Court
18 of the State of Idaho from the judgment made and entered against it in the above entitled action and in the above entitled court in favor of the plaintiffs in said action on the 31st day of May, 1928, for the sum of Nineteen Thousand Five Hundred ($19,500.00) Dollars and for Seventy-three and 70/100 ($73.70) Dollars costs in said suit, making a total of Nineteen Thousand Five Hundred and Seventy-three and 70/100 ($19,573.70) Dollars, and from the whole of said judgment;

AND WHEREAS, the said appellant, Singer Sewing Machine Company, a corporation, is desirous of staying the execution of said judgment so appealed from;

NOW, THEREFORE, the undersigned American Surety Company, a corporation authorized to, and doing business in the State of Idaho, in consideration of the premises and of such appeal on the part of said appellant, Singer Sewing Machine Company, a corporation, does hereby acknowledge itself firmly bound in the sum of twenty-five Thousand ($25,000.00) Dollars, gold coin of the United States, that if the said judgment appealed from, or any part thereof, be affirmed, or the appeal dismissed, the appellant will pay in gold coin of the United States of America, the amount directed to be paid as to which said judgment shall be affirmed, if affirmed only in part, and all damages and costs which may be awarded against the appellant upon the appeal, and that if the said appellant does not make such payment within thirty days from the filing of the remittitur from the Supreme Court in the court from which the appeal is taken, judgment may be entered on motion of the respondents in their favor and against the undersigned surety for the said sum of Nineteen Thousand Five Hundred Seventy-three and 70/100 ($19,573.70) Dollars, together with the interest that may be due thereon and the damages and costs which may be awarded against the said appellant, Singer Sewing Machine Company, upon the appeal.

IN WITNESS WHEREOF, the said American Surety Company, has caused its name and seal to

be attached hereto by its proper officers and agents at Boise, Idaho, this 28th day of August, 1928.

AMERICAN SURETY COMPANY OF NEW YORK,

By HOWARD E. STEIN,
Attorney-in-Fact.

Countersigned:

HOWARD E. STEIN,
(SEAL) Agent at Boise, Idaho.

Countersigned:

RICHARDS & HAGA,
O. O. HAGA.

It is hereby agreed that the within bond is hereby accepted insofar as the amount is concerned without regard to it being double the amount of the judgment.

Dated at Boise, Idaho, this 29th day of August, 1928.

JAMES F. AILSHIE, JR.,
J. R. SMEAD,
Attorneys for Plaintiffs.
Residence: Boise, Idaho.

(Endorsed: Filed August 29, 1928.)

25

## Order for Reporter's Transcript.

[Title of Court and Cause.]

*To J. A. Weaver, Official Court Reporter of the above entitled court:*

It appearing to the judge of the above entitled court that the defendants in the above entitled cause have appealed to the Supreme Court from the judgment made and entered in the above entitled cause on May 31, 1928, and that they have made an application to this court for an order directing the court reporter to prepare a transcript of all the testimony and proceedings in said cause as required by law,

26

Now, therefore, you are hereby ordered and directed to forthwith prepare and lodge with the clerk of this court within ninety days of the receipt of this order a transcript of all the testimony and proceedings in this cause as required by law.

Done and dated in open court this 30th day of August, 1928.

27

Clinton H. Hartson,
District Judge.

28

## Praecipe.

[TITLE OF COURT AND CAUSE.]

*To Stephen Utter, Clerk of the above entitled court:*

The above named defendants, Singer Sewing Machine Company, a corporation, and Ed Anderson, having appealed to the Supreme Court of the State of Idaho from that certain judgment made and entered in the above entitled court in the
29 above entitled cause on the 31st day of May, 1928, hereby request that you prepare a transcript for use on such appeal consisting of the judgment roll and of all papers constituting the same, including:

The complaint of the plaintiff;

The demurrer and motions of the defendants, and orders or minute entries showing the rulings of the court thereon and demand for change of venue to the Federal court on the part of the defendants, Singer Sewing Ma-
30 chine Company, a corporation, and Ed Anderson, together with all affidavits connected therewith;

Orders and minute entries showing the ruling of the court thereon;

The separate answers of the defendants;

The verdict of the jury and the judgment rendered thereon, and any and all papers that may be properly included in said judgment roll under the rules of the State of Idaho and the rules of the Supreme Court, and the

31

Notice of appeal;
Undertaking on appeal, and the
Reporter's Transcript hereafter to be settled in this cause, and
Copy of the Praecipe, and such other papers as are required under the laws of the State of Idaho and the rules of the Supreme Court or the rules of this Court.

You are further requested to show by your certificate to said transcript, in addition to other matters required by law to be shown therein, the date on which said Undertaking on Appeal was filed.

32

We tender you herewith $17.00 in payment of the following:

| | |
|---|---|
| Supreme Court filing fees..... | $12.00 |
| Clerk's fee for certifying transcript | 5.00 |

and we also tender you in addition to the above costs the cost of preparing said transcript at the rate of 10 cents per folio.

Dated this 29th day of August, 1928.

33

MARTIN & MARTIN,
H. B. WALKER,
Attorneys for Defendants and Appellants.
Residence: Boise, Idaho.

(Endorsed: Filed August 30th, 1928.)

34

## Notice of Appeal.

[Title of Court and Cause.]

*To the plaintiffs, Vivian F. Baldwin, and E. R. Baldwin, and to James F. Ailshie, Jr., and J. R. Smead, their attorneys of record, and to the defendant Singer Sewing Machine Company, a corporation, and to Martin & Martin, its attorneys of record, and to Stephen Utter, Clerk of the above entitled court:*

35

You and each of you will please take notice that the above named defendant, Ed. Anderson, hereby appeals to the Supreme Court of the State of Idaho, from that certain order made and entered on April 2nd, 1929, in the above entitled cause denying and over-ruling this defendant's motion to set aside the judgment entered herein and to grant a new trial to this defendant, and from the whole of said order.

Dated April 8th, 1929.

36

H. B. Walker,
Attorney for Defendant,
Ed. Anderson.
Residence: Boise, Idaho.

(Endorsed: Filed April 9, 1929.)

37

## Notice of Appeal.

[TITLE OF COURT AND CAUSE.]

*To the plaintiffs Vivian F. Baldwin and E. R. Baldwin, and to James F. Ailshie, Jr., Esquire, and J. R. Smead, Esquire, their attorneys of record, and to the defendant Ed. Anderson, and H. B. Walker, Esquire, his attorney of record, and to Stephen Utter, Clerk of the above entitled court:*

38

You and each of you will please take notice that the above named defendant, Singer Sewing Machine Company, hereby appeals to the Supreme Court of the State of Idaho, from that certain order made and entered on April 2nd, 1929, in the above entitled cause denying and over-ruling this defendant's motion to set aside the judgment entered herein and to grant a new trial to this defendant, and from the whole of said order.

Dated this 8th day of April, 1929.

39

MARTIN & MARTIN,
Attorneys for Defendant Singer
Sewing Machine Company.
Residence: Boise, Idaho.

(Endorsed: Filed April 9, 1929.)

40

## Clerk's Certificate.

IN THE

SUPREME COURT OF THE STATE OF IDAHO.

| | |
|---|---|
| VIVIAN F. BALDWIN, Respondent, *vs.* SINGER SEWING MACHINE CO., a Corporation, and ED. ANDERSON, Appellants. | No. 5321. |

41

This cause having been heretofore heard and taken under advisement by the court, and the court having fully considered the same, on this day the decision of the court by Justice Lee, is delivered, to the effect that the judgment of the district court of the third judicial district in and

42 for Ada County be reversed as to appellant Singer Sewing Machine Company, and affirmed as to appellant Anderson. Costs awarded to appellant Singer Sewing Machine Company, in the sum of $488.35. Costs as against appellant Anderson to respondents in the sum of $40.00.

I, Clay Koelsch, Clerk of the Supreme Court of the State of Idaho, do hereby certify that the preceding and annexed contains a true and correct copy of the original judgment entered in the

*Clerk's Certificate.* 43

above entitled cause, on the tenth day of April, 1930, and now on file in my office.

Witness my hand and the seal of the court this 11th day of April, 1930.

CLAY KOELSCH,
Clerk.

By EDITH J. HEARNE,
Deputy Clerk.

(Seal)

44

(Endorsed: Filed May 22, 1930.)

---

## Judgment.

[TITLE OF COURT AND CAUSE.]

This cause coming on regularly to be heard on the 21st day of May, 1928, before the court and a jury, and a judgment being regularly and duly entered and filed on May 31st, 1928, whereby the plaintiffs were given judgment against the defendants in the sum of Nineteen Thousand Five Hundred Dollars; thereafter the said defendants having appealed to the Supreme Court of the State of Idaho, from the judgment made and entered herein, and thereafter, and on May 10th, 1930, the Supreme Court of the State of Idaho made and entered its decision in this matter reversing said judgment as to the defendant Singer Sewing Machine Company, and the remittitur of the Supreme Court having been duly issued out of the said Su- 45

46 *Judgment.*

preme Court and filed with the Clerk of this Court on May 22nd, 1930, by the terms of which it was ordered and adjudged that the judgment of the District Court made and entered as hereinabove set out against the Singer Sewing Machine Company be reversed and the cause of action dismissed as to said defendant, Singer Sewing Machine Co., and affirmed as to defendant Ed. Anderson.

Now, Therefore, in accordance with the said de-
47 cision and remittitur and in compliance therewith.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, AND THIS DOES ORDER, ADJUDGE AND DECREE that the plaintiffs Vivian F. Baldwin and E. R. Baldwin take nothing from defendant Singer Sewing Machine Co., and that the said cause of action be, and the same is hereby dismissed as to the defendant Singer Sewing Machine Company, a corporation.

And in further compliance with said remittitur of the Supreme Court of the State of Idaho, the said defendant Singer Sewing Machine Company,
48 a corporation, is hereby given judgment against the said Vivian F. Baldwin and E. R. Baldwin for the sum of Four Hundred Eighty-eight and 55/100 Dollars ($488.55) as and for its costs incurred in the Supreme Court, together with interest thereon at the rate of seven per cent per annum from May 10th, 1930; and the said defendant, Singer Sewing Machine Company, is hereby given judgment against the said plaintiffs Vivian F. Baldwin and E. R. Baldwin for the sum of $....., its costs incurred upon the trial of this cause in the District

49

Court, making a total judgment that the said Singer Sewing Machine Company, a corporation, do have and recover of and from the said Vivian F. Baldwin and E. R. Baldwin in the sum of $.....

Done and dated in open court this 24 day of May, 1930.

DANA E. BRINCK,
District Judge.

50

(Endorsed: Filed May 24, 1930.)

51

52

## Judgment.

IN THE

DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO,

IN AND FOR THE COUNTY OF ADA.

VIVIAN F. BALDWIN and E. R. BALDWIN,
Plaintiffs,

53

*vs.*

ED. ANDERSON,
Defendant,

*and*

AMERICAN SURETY COMPANY OF NEW YORK, a corporation,
Surety.

54 In the above entitled cause the plaintiffs, having recovered judgment herein, on the 31st day of May, 1928, against the defendant Ed. Anderson and Singer Sewing Machine Company, a corporation, for the sum of $19,500.00 with interest at seven per cent. per annum from said date, and the said defendant Ed. Anderson and Singer Sewing Machine Company having appealed to the Supreme Court of the State of Idaho from the said judgment, and an undertaking having been executed by the American Surety Company of New York, a corporation, authorized to act as surety in the State of Idaho,

having been given to plaintiffs as respondents upon the said appeal for the stay of execution of said judgment, pending said appeal in accordance with the provisions of Section 7155, Idaho Compiled Statutes, and by which undertaking the said American Surety Company of New York, a corporation, did undertake and obligate itself to the plaintiffs herein under the said statutory obligations in the sum of $25,000.00, and having thereby obligated itself to the effect that if the said judgment so appealed from, or any part thereof, should be affirmed the said American Surety Company of New York, a corporation, would pay the amount directed to be paid by the said judgment, or part thereof which should be affirmed, and all damages and costs which should be awarded plaintiffs, and providing that upon the failure to make payment within thirty days after the filing of the remittitur from the Supreme Court in the above entitled District Court, from which said appeal was taken, judgment might be entered on motion of said plaintiffs in their favor against the said surety company, to-wit, the American Surety Company of New York, for such amount together with interest that might be due thereon, and the damages and costs which might be awarded in favor of plaintiffs upon the appeal; and said appeal to the Supreme Court of the State of Idaho by the said defendant Ed. Anderson and Singer Sewing Machine Company having been affirmed in part and reversed in part, viz.:

> "Reversed as to appellant Singer Sewing Machine Company, affirmed as to appellant Anderson."

58 *Judgment.*

and the remittitur from the Supreme Court of Idaho to the above entitled District Court having been filed in the office of the Clerk of the above entitled Court on May 22nd, 1930, and costs having been taxed in favor of plaintiffs and against the defendant Ed. Anderson in the sum of $40.00, and more than thirty days having elapsed since the filing of said remittitur from the Supreme Court in the District Court, and defendant Ed. Anderson having failed to pay the said judgment as affirmed, or any part thereof, and the plaintiffs having
59 moved the Court for a judgment against the said American Surety Company of New York, a corporation, and the court being fully advised in the premises:

DOES HEREBY ORDER AND ADJUDGE, That the plaintiffs do have and recover of and from the American Surety Company of New York, a corporation, the sum of $19,500.00, together with the sum of $2,817.21 interest thereon at the rate of seven per cent per annum from the 31st day of May, 1928, to the 23rd day of June, 1930, together with $40.00
60 costs as provided for in the remittitur of the Supreme Court of Idaho, making the total sum of $22,357.21, together with interest thereon at the rate of seven per cent per annum from date hereof until paid, and that the plaintiffs have execution therefor.

Done in open court this 23rd day of June, 1930.

CHARLES F. KOELSCH,
District Judge.

(Endorsed: Filed June 23, 1930.)

61

## Notice of Motion.

[TITLE OF COURT AND CAUSE.]

*To the above named plaintiffs and to James F. Ailshie, Jr. and J. R. Smead, their attorneys:*

YOU AND EACH OF YOU are hereby notified that on the 28th day of June, 1930, at 10:00 o'clock A. M., or as soon thereafter as counsel can be heard at the court room of the above entitled Court in Boise, Idaho, the undersigned American Surety Company of New York will move the Court 62
to vacate the judgment made and entered in the above entitled action in favor of the above named plaintiffs and against the said American Surety Company of New York on the 23rd day of June, 1930, and to stay all proceedings issued under execution upon said judgment.

Said motion will be made upon the records and files in this action, including the supersedeas bond on which said judgment is based, and the affidavit of McKeen F. Morrow. A copy of said motion, to which is attached a copy of said supersedeas bond and a copy of said affidavit of McKeen F. Morrow, 63
is hereto attached and herewith served upon you.

Dated this 26th day of June, 1930.

RICHARDS & HAGA,
MARTIN & MARTIN,
Attorneys for American Surety Company
of New York, a Corporation.

64

## Motion.

[Title of Court and Cause.]

Comes now American Surety Company of New York, a New York corporation, and moves this Honorable Court to vacate and set aside that certain judgment against said American Surety Company of New York, made and entered in the above entitled cause on the 23rd day of June, 1930, upon the following grounds and for the following reasons, to-wit:

65

I.

That said judgment is void in that the supersedeas bond on which said judgment is based shows on its face that it was given on the appeal of the Singer Sewing Machine Company in this action and for the purpose of staying execution against that company, that said bond did not stay or purport to stay said judgment against the other defendant, Ed. Anderson, and it appears from said judgment and the records and files in this action that the Supreme Court of Idaho reversed the judgment against said appellant, Singer Sew-

66

ing Machine Company, from which it appealed, and that upon the remittitur from said Supreme Court this Court vacated the said judgment appealed from as to Singer Sewing Machine Company, dismissed said action as against it, and entered judgment in its favor against plaintiffs herein on or about May 24, 1930.

II.

That said judgment is void in that the supersedeas bond on which said judgment is based

shows on its face that the said American Surety Company of New York executed said bond solely in consideration of the appeal by Singer Sewing Machine Company from the judgment entered herein on or about May 31, 1928, and said appeal was sustained and there has, therefore, been no breach of the condition of the bond.

III.

That the enforcement of said judgment is contrary to good conscience and equity because the said supersedeas bond on which said judgment is based was executed solely in consideration of that certain appeal taken by said Singer Sewing Machine Company from the judgment herein entered on or about May 31, 1928, and for the purpose of staying execution on said judgment against said Singer Sewing Machine Company and the appeal of said Singer Sewing Machine Company was sustained and pursuant to the remittitur from the Supreme Court of Idaho, judgment was entered herein on or about May 24, 1930, to the effect that plaintiffs take nothing in said action against said Singer Sewing Machine Company, and that the case be dismissed as to said company, and that Singer Sewing Machine Company have judgment against plaintiffs herein for the sum of Five Hundred Twenty-two and 85-100 Dollars ($522.85), and it is, therefore, contrary to good conscience and equity to enter judgment against the said American Surety Company of New York, as surety, when no recovery can be had against its sole principal on said supersedeas bond.

70 *Motion.*

IV.

That said judgment was entered without notice to the said American Surety Company of New York or the said Singer Sewing Machine Company.

And said American Surety Company of New York further moves this Court to stay all proceedings under execution upon said judgment pending the determination of this motion.

Said motion is based on the records and files in
71 this action, including a copy of the said supersedeas bond hereto attached and made a part hereof, and the affidavit of McKeen F. Morrow hereto attached and made a part hereof.

RICHARDS & HAGA,
MARTIN & MARTIN,
Attorneys for American Surety Company of New York.
Residence: Boise, Idaho.

(Endorsed: Filed June 26, 1930.)

72

73

## Exhibit "A".

IN THE

DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO,

IN AND FOR THE COUNTY OF ADA.

VIVIAN F. BALDWIN, and E. R. BALDWIN,
Plaintiffs,

74

*vs.*

SINGER SEWING MACHINE COMPANY, a corporation, and ED. ANDERSON,
Defendants.

**Undertaking on Appeal.**

No. 11860

75

Filed A. M.....P. M....., August 29, 1928.

STEPHEN UTTER,
Clerk,

By B. CLYDE EAGLESON,
*Deputy.*

Whereas the defendant, Singer Sewing Machine Company, a corporation, in the above en-

76 *Exhibit A.*

titled action has appealed to the Supreme Court of the State of Idaho from the judgment made and entered against it in the above entitled action in the above entitled court in favor of the plaintiffs in said action on the 31st day of May, 1928, for the sum of Nineteen Thousand Five Hundred ($19,500.00) Dollars and for Seventy-three and 70-100 ($73.70) Dollars costs in said suit, making a total of Nineteen Thousand Five Hundred Seventy-three and 70-100 ($19,573.70) Dollars, and from the whole of said judgment;

77

AND WHEREAS, the said appellant, Singer Sewing Machine Company, a corporation, is desirous of staying the execution of said judgment so appealed from;

NOW, THEREFORE, the undersigned American Surety Company, a corporation authorized to, and doing business in the State of Idaho, in consideration of the premises and of such appeal on the part of said appellant, Singer Sewing Machine Company, a corporation, does hereby acknowledge itself firmly bound in the sum of Twenty-
78 five Thousand ($25,000.00) Dollars, gold coin of the United States, that if the said judgment appealed from, or any part thereof, be affirmed, or the appeal dismissed, the appellant will pay in gold coin of the United States of America, the amount directed to be paid as to which said judgment shall be affirmed, if affirmed only in part, and all damages and costs which may be awarded against the appellant upon the appeal, and that if the said appellant does not make such payment within thirty days from the filing of the remittitur from the Supreme Court in the court from which

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the appeal is taken, judgment may be entered on motion of respondents in their favor and against the undersigned surety for the sum of Nineteen Thousand Five Hundred Seventy-three and 70-100 ($19,573.70) Dollars, together with the interest that may be due thereon and the damages and costs which may be awarded against the said appellant, Singer Sewing Machine Company, upon the appeal.

IN WITNESS WHEREOF, the said American Surety Company, has caused its name and seal to be attached hereto by its proper officers and agents at Boise, Idaho, this 28th day of August, 1928.

80

AMERICAN SURETY COMPANY OF NEW YORK,
By HOWARD E. STEIN,
Attorney-in-Fact.
Countersigned:
HOWARD E. STEIN,
Agent at Boise, Idaho.

(SEAL)

Countersigned:
RICHARD & HAGA,
O. O. HAGA.

81

It is hereby agreed that the within bond is hereby accepted insofar as the amount is concerned without regard to it being double the amount of the judgment.

Dated at Boise, Idaho, this 29th day of August, 1928.

JAMES F. AILSHIE, JR.,
J. R. SMEAD,
Attorneys for Plaintiffs.
Residence: Boise, Idaho.

82

## Affidavit.

[TITLE OF COURT AND CAUSE.]

STATE OF IDAHO, }
COUNTY OF ADA, } ss.:

McKEEN F. MORROW, being first duly sworn, upon his oath, deposes and says: That he is a member of the firm of Richards & Haga, attorneys for American Surety Company of New York, and makes this affidavit on behalf of said American
83 Surety Company of New York for the reason that all of its officers reside outside the State of Idaho, where attorneys for said party reside, and that he has personal knowledge of the facts herein set forth; that the judgment entered herein in favor of plaintiffs and against American Surety Company of New York, a corporation, surety, was made and entered without notice to said American Surety Company of New York or any of its officers or agents; that after the entry of said judgment and on or about the 24th day of June, 1930, the said plaintiffs, through their attorneys, caused
84 execution to issue from the above entitled Court upon said judgment and thereupon delivered said execution to the Sheriff of Ada County, together with a written demand addressed to the Treasurer of the State of Idaho for delivery of certain United States Liberty Bonds held by said State Treasurer pursuant to Section 5104, Compiled Statutes of Idaho, sufficient to satisfy said judgment. That thereupon the said Sheriff of Ada County served said writ of execution upon Byron Defenbach, Treasurer of the State of Idaho, on

said 24th day of June, 1930, and presented a written demand for delivery of bonds deposited with said State Treasurer by the said American Surety Company of New York sufficient in amount to satisfy said judgment, and thereupon the said Byron Defenbach, Treasurer of the State of Idaho, delivered to the said Sheriff of Ada County certain registered United States Liberty Bonds payable to the Treasurer of the State of Idaho, bearing four and one-quarter per cent interest, maturing 1933-1938, numbered as follows: Bonds 46289 and 46290, $10,000 each; bonds 559144, 559145 and 559146, $1,000 each, together with the unmatured coupons attached thereto. That the said Sheriff of Ada County, Idaho, at the request of attorneys for plaintiffs thereupon issued and posted a certain notice of sale to the effect that said bonds would be sold at public auction to the highest bidder for cash on Monday, June 30, 1930, at 10:00 o'clock A. M. That the levy of said execution and the taking of possession of said bonds and the advertising of said bonds for sale as aforesaid is in violation of the provisions of Section 5104, Idaho Compiled Statutes, 1919.

McKeen F. Morrow.
(Duly verified)

88

## Stipulation.

[Title of Court and Cause.]

It is hereby stipulated and agreed, by and between the plaintiffs and the defendants, Singer Sewing Machine Company, a corporation, Ed. Anderson, and American Surety Company of New York, that the sale of certain securities belonging to the American Surety Company of New York, heretofore noticed by the Sheriff of Ada County, Idaho, for August 11th, 1930, may be postponed
89 until the 21st day of August, 1930.

This stipulation is made by reason of the fact that the above entitled court now has under advisement the motion of the defendant, American Surety Company of New York, to vacate and set aside the judgment for $22,357.21, together with interest, entered against said defendant American Surety Company of New York on June 23, 1930.

This stipulation is expressly made without any of the defendants concurring in or recognizing in any manner or to any extent the validity of the said judgment or the execution issued pursuant
90 thereto or any other steps or proceedings taken by plaintiffs pursuant to said judgment or execution, and is made without waiver by any of the said defendants of any objections or exceptions to the validity of the said judgment and the said execution issued pursuant thereto, and any steps or proceedings taken pursuant either to said judgment or to said execution.

*Stipulation.* 91

This stipulation is made by all parties without waiver of any rights on behalf of any of them except as to the continuance of said sale.

Dated this 8th day of August, 1930.

JAMES F. AILSHIE, JR.,
J. R. SMEAD,
Attorneys for Plaintiffs.

MARTIN & MARTIN,
Attorneys for Defendant Singer Sewing Machine Company, a Corporation. 92

H. B. WALKER,
Attorney for Ed. Anderson.

RICHARDS & HAGA,
Attorneys for Defendant American Surety Company of New York.

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**Order.** 93

Pursuant to the foregoing stipulation, it is hereby ordered that the Sheriff's sale of certain securities of the American Surety Company of New York, heretofore noticed by the Sheriff of Ada County, Idaho, for August 11th, 1930, be and the same hereby is postponed and continued to the 21st day of August, 1930, at 10:00 o'clock, A. M.

CHARLES F. KOELSCH,
District Judge.

94 **Minutes of the Proceedings of the District Court of the Third Judicial District of the State of Idaho, in and for Ada County, on August 12, 1930. Journal Y, Page 155.**

| | |
|---|---|
| VIVIAN F. BALDWIN, Plaintiff, *vs.* SINGER SEWING MACHINE COMPANY *et al.*, Defendants. | No. 11,860 |

95 In this cause the motion to declare the judgment void and to set the same aside having been heretofore taken under advisement, the court at this time rendered its decision and granted said motion and ordered counsel for the Surety Company to prepare the proper order to this effect to which ruling the plaintiffs duly excepted, which exception was allowed by the court.

96 CHARLES F. KOELSCH,
District Judge.

## Order Vacating Judgment.

97

[TITLE OF COURT AND CAUSE.]

The motion of American Surety Company of New York, a corporation, to vacate and set aside that certain judgment entered against said American Surety Company of New York, a corporation, for the sum of $22,357.21, together with interest thereon at the rate of seven per cent per annum from date until paid, made and entered in the above entitled cause on the 23rd day of June, 1930, having come on duly for hearing before the 98
Court on June 30, 1930, Messrs. Richards & Haga and Messrs. Martin & Martin appearing for said American Surety Company of New York, a corporation, and James F. Ailshie, Jr., and J. R. Smead, appearing for the plaintiffs, Vivian F. Baldwin and E. R. Baldwin, and the matter having been argued to the Court, and the Court being fully advised in the premises;

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED and DECREED, That that certain judgment made and entered in the above entitled cause on June 23, 1930, against the American Surety Company 99
of New York, a corporation, in the sum of $22,357.21, together with interest thereon at the rate of seven per cent per annum from date until paid, be, and the same hereby is, vacated, annulled and set aside, and the same is hereby declared to be null and void, and the execution issued pursuant thereto be, and the same hereby is quashed and recalled.

Dated this 12th day of August, 1930.

CHARLES F. KOELSCH,
District Judge.

(Endorsed: Filed August 12, 1930.)

100

## Certificate of Papers Used.

[Title of Court and Cause.]

The court having heretofore, on the 12th day of August, 1930, entered an order vacating and setting aside that certain judgment made and entered in the above entitled cause on June 23rd, 1930, in favor of the plaintiffs and against the American Surety Company of New York, a corporation, now certifies that in passing upon defendant American Surety Company's motion to vacate
101 and set aside the said judgment, the following papers, records and files were considered and none other.

Judgment in favor of the said plaintiffs and against the defendants Ed. Anderson and Singer Sewing Machine Company, entered May 31, 1928.

Notice of appeal of defendants Anderson and Singer Sewing Machine Company, dated August 27, 1928.

Undertaking on appeal, filed August 29, 1928.

Stay or supersedeas bond, filed August 29, 1928.

Order directing the reporter to prepare a tran-
102 script of the evidence upon the trial, dated August 29, 1928.

Praecipe to clerk of defendants Anderson and Singer Sewing Machine Company.

Remittitur of the Supreme Court of Idaho.

Judgment of May 24, 1930, based upon remittitur of the Supreme Court of Idaho.

Judgment against the American Surety Company, dated June 23, 1930.

Motion, dated June 26, 1930, to vacate and set aside as null and void the said judgment against

said American Surety Company, together with supporting affidavit.

Stipulation and order approving the same, filed August 9, 1930.

Notice of appeal by defendant Anderson from order denying new trial.

Notice of appeal by defendant Singer Sewing Machine Company from order denying new trial. Dated this 18th day of August, 1930.

CHAS. F. KOELSCH,
District Judge. 104

(Endorsed: Filed August 18, 1930.)

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## Notice of Appeal.

[TITLE OF COURT AND CAUSE.]

*To Singer Sewing Machine Company, a corporation, and Messrs. Martin & Martin and H. B. Walker, its attorneys, Ed. Anderson and Messrs. Martin & Martin and H. B. Walker, his Attorneys, American Surety Company of New York and Messrs. Richards & Haga and Martin & Martin, its attorneys, and to Stephen Utter, clerk of the above entitled District Court:* 105

YOU AND EACH OF YOU will please take notice that the plaintiffs hereby appeal to the Supreme Court of the State of Idaho from that certain order, made and entered in the above entitled action on

the 12th day of August, 1930, which said order vacates and holds as void that certain judgment entered in favor of plaintiffs and against the American Surety Company of New York on the 23rd day of June, 1930, for the sum of $22,357.21, together with interest.

Dated this 19th day of August, 1930.

JAMES F. AILSHIE, JR.,
J. R. SMEAD,
Attorneys for Plaintiffs.

Service admitted this 19th day of August, 1930.

MARTIN & MARTIN,
Attorneys for Singer Sewing Machine Company.

RICHARDS & HAGA,
Attorneys for American Surety Company of New York.

H. B. WALKER,
Attorney for Ed. Anderson.

(Endorsed: Filed August 19, 1930.)

## Undertaking on Appeal.

[TITLE OF COURT AND CAUSE.]

WHEREAS, the plaintiffs, Vivian F. Baldwin and E. R. Baldwin, in the above entitled action have appealed to the Supreme Court of the State of Idaho from that certain order made and entered on the 12th day of August, 1930, which said order vacates and holds as null and void that certain judgment in favor of plaintiffs and against the American Surety Company of New York, for the sum of $22,357.21, together with interest;

Now, THEREFORE, The Maryland Casualty Company of Baltimore, Maryland, a foreign corporation authorized to, and doing business in the State of Idaho, in consideration of the premises and of such appeal, does hereby undertake and promise, on the part of said appellants Vivian F. Baldwin and E. R. Baldwin, that the said appellants will pay all damages and costs which may be awarded against them on the appeal or on a dismissal thereof, not exceeding $300.00, to which amount the said Maryland Casualty Company of Baltimore, Maryland, acknowledges itself duly bound.

IN WITNESS WHEREOF, the said Maryland Casualty Company of Baltimore, Maryland, has caused its name and seal to be attached hereto by its proper officer and agent at Boise, Idaho, this 19 day of August, 1930.

MARYLAND CASUALTY COMPANY OF
BALTIMORE, MARYLAND,
(SEAL) By BRADLEY SHEPPARD,
Attorney-in-Fact.

(Endorsed: Filed August 19, 1930.)

112

## Praecipe.

[TITLE OF COURT AND CAUSE.]

*To Stephen Utter, Clerk of the above entitled District Court:*

You will please take notice that you are hereby requested and required to prepare a transcript in the above entitled cause for use on appeal to the Supreme Court of the State of Idaho, which transcript shall consist of and embrace the following
113 papers and matters, to-wit:

1. The following from the records and files of Baldwin, *et al., v.* Singer Sewing Machine Company and Ed. Anderson:

Judgment in favor of plaintiffs entered May 31, 1928.

Notice of Appeal of the defendants, dated August 27, 1928.

Undertaking on said appeal, filed August 29, 1928.

114 Supersedeas bond on said appeal, filed August 29, 1928.

Order directing reporter to prepare a transcript of the evidence upon the trial of said case, dated August 29, 1928.

Praecipe to Clerk to the defendants in said case.

Notice of appeal by defendant Anderson from order denying new trial.

Notice of appeal by defendant Singer Sewing Machine Company from order denying new trial.

Remittitur of the Supreme Court of Idaho.
Judgment entered May 24, 1930, pursuant to said remittitur. 115

2. And the following from the records and files herein:

Judgment against the American Surety Company, dated June 23, 1930.
Motion, dated June 26, 1930, to vacate and set aside as void said judgment against the American Surety Company, together with supporting affidavit. 116
Stipulation and order approving the same, filed August 9, 1930.
Order of District Court granting said motion to vacate judgment against the American Surety Company.
Notice of appeal of Vivian F. Baldwin and E. R. Baldwin from said order.
Undertaking on said appeal.
Minutes of the court of August 12, 1930.
Certificate of trial judge of papers and files used upon the hearing and decision of said motion. 117
This praecipe.

And you are further requested to attach your certificate to said transcript, as provided by law.

Dated this 20th day of August, 1930.

JAMES F. AILSHIE, JR.,
J. R. SMEAD,
Attorneys for Plaintiffs and Appellants.

(Endorsed: Filed August 20, 1930.)

118

## Transcript of Record.

[Title of Court and Cause.]

We, the undersigned, James F. Ailshie, Jr., and J. R. Smead, attorneys for Vivian F. Baldwin and E. R. Baldwin; Martin & Martin, attorneys for Singer Sewing Machine Company, a corporation; H. B. Walker, attorney for Ed. Anderson; and Richards & Haga and Martin & Martin, attorneys for American Surety Company of New York, a
119 corporation, do hereby certify the foregoing transcript of pages numbered from 5 to 38, inclusive, to be full, true and correct copies of the pleadings and proceedings in the above entitled cause, and that the same constitute the transcript of the record herein upon appeal to the Supreme Court of the State of Idaho, and that we have compared the foregoing transcript with the original papers in the above entitled action of Vivion F. Baldwin and E. R. Baldwin, plaintiffs, *vs.* Ed. Anderson, defendant, and American Surety Company of New York, a corporation, surety, in the district
120 court of the third judicial district of the State of Idaho, in and for the County of Ada, and on file of record in the office of the clerk of said district court, and certify that the foregoing transcript contains true and correct copies of the following papers and matters, to-wit:

1. The following from the records and files of Baldwin *et al., vs.* Singer Sewing Machine Company and Ed. Anderson:

Judgment in favor of plaintiffs entered May 31, 1928.

Notice of appeal of the defendants, dated August 27, 1928.

Undertaking on said appeal, filed August 29, 1928.

Supersedeas bond on said appeal, filed August 29, 1928.

Order directing reporter to prepare a transcript of the evidence upon the trial of said case, dated August 29, 1928.

Praecipe to Clerk of the defendants in said case.

Notice of appeal by defendant Anderson from order denying new trial.

Notice of appeal by defendant Singer Sewing Machine Company from order denying new trial.

Remittitur of the Supreme Court of Idaho.

Judgment entered May 24, 1930, pursuant to said remittitur.

2. And the following from the records and files herein:

Judgment against the American Surety Company, dated June 23, 1930.

Motion, dated June 26, 1930, to vacate and set aside as void said judgment against the American Surety Company, together with supporting affidavit.

Stipulation and order approving the same, filed August 9, 1930.

124 *Transcript of Record.*

Order of District Court granting said motion to vacate judgment against the American Surety Company.

Notice of appeal of Vivian F. Baldwin and E. R. Baldwin from said order.

Undertaking on said appeal.

Minutes of the court of August 12, 1930.

Certificate of trial judge of papers and files used upon the hearing and decision of said motion.

125 The praecipe.

We further certify that an undertaking on appeal in due form was filed in said action on the 19th day of August, 1930.

FURTHER, it is stipulated that the foregoing transcript shall be used in lieu of and with the same force and effect as a clerk's transcript of the foregoing papers and matters, and that this certificate shall in all respects have the same force and effect of a certificate of the clerk of the district court of the third judicial district of the State

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of Idaho, in and for the county of Ada, duly executed.

Dated this 5th day of September, 1930.

JAMES F. AILSHIE, JR.,
J. R. SMEAD,
Attorneys for Plaintiffs.

H. B. WALKER,
Attorney for Defendant Ed. Anderson.

128

MARTIN & MARTIN,
Attorneys for Singer Sewing Machine Company, a corporation.

RICHARDS & HAGA,
MARTIN & MARTIN,
Attorneys for American Surety Company of New York, a corporation.

Service of the foregoing transcript is hereby admitted this 11th day of September, 1930.

129

H. B. WALKER
Attorney for Ed. Anderson.

MARTIN & MARTIN
Attorneys for Singer Sewing Machine Company.

RICHARDS & HAGA
MARTIN & MARTIN
Attorneys for American Surety Company of New York.

Supreme Court of Idaho
Filed
Sep 11 1930
CLAY KOELSCH,
Clerk

130

## Order.

BOISE, IDAHO, March 9, 1931.

Court met pursuant to adjournment.

Present: Chief Justice LEE and Associate Justices BUDGE, GIVENS, VARIAN and MCNAUGHTON.

The following proceedings (among others) were had:

131

VIVIAN F. BALDWIN, *et al.*,
Appellants,

*v.*

ED. ANDERSON, *et al.*,
Respondents.

No. 5653

This cause having been heretofore set for hearing on the merits on this day the same was called, James F. Ailshie and J. R. Smead appeared as
132 counsel for appellants, Frank Martin, Sr., and McKeen Morrow appeared for respondents. Upon argument this cause was ordered taken under advisement.

133

## Order.

BOISE, IDAHO, May 2, 1931.

Court met pursuant to adjournment.

Present: Associate Justices BUDGE, GIVENS, VARIAN and MCNAUGHTON.

The following proceedings (among others) were had:

134

| | |
|---|---|
| VIVIAN F. BALDWIN and E. R. BALDWIN, Appellants, v. ED. ANDERSON and AMERICAN SURETY COMPANY OF NEW YORK, a corporation, Respondents. | No. 5653 |

135

This cause having been heretofore heard and taken under advisement by the Court, and the Court having fully considered the same, on this day the decision of the Court is delivered by Justice McNaughton, to the effect that the order of the District Court of the Third Judicial District for Ada County vacating the judgment be and the same is hereby reversed, with costs to appellants in the sum of $96.

136 **Opinion by McNaughton, J.**

IN THE

SUPREME COURT OF THE STATE OF IDAHO.

No. 5653.

VIVIAN F. BALDWIN and E. R. BALDWIN,
Appellants,

137 *vs.*

ED. ANDERSON and AMERICAN SURETY COMPANY OF NEW YORK, a corporation,
Respondents.

Boise, Jan. Term, 1931.
Filed May 2, 1931.
Clay Koelsch, Clerk.

Appeal from the District Court of the Third Judicial District, for Ada County. Hon. Charles F. Koelsch, Judge.

138 Appeal from an order setting aside judgment on supersedeas undertaking. *Reversed.*

JAMES F. AILSHIE, JR., and J. R. SMEAD, for Appellants.

MARTIN & MARTIN, H. B. WALKER, and RICHARDS & HAGA, for Respondents.

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MCNAUGHTON, J.

This is an appeal from an order setting aside as void a judgment against a bondsman. The

judgment against the respondent company was entered pursuant to C. S., sec. 7155, on an undertaking on appeal.

Appellants Baldwin, as plaintiffs, had procured a judgment against Ed. Anderson and the Singer Sewing Machine Company as defendants in the district court. The defendants jointly gave notice of appeal and appealed the case to the supreme court. On appeal the following undertaking was executed and filed:

"Whereas the defendant, Singer Sewing 140
Machine Company, a corporation, in the above entitled action has appealed to the Supreme Court of the State of Idaho from the judgment made and entered against it in the above entitled action and in the above entitled court in favor of the plaintiffs in said action on the 31st day of May, 1928, for the sum of Nineteen Thousand Five Hundred ($19,500.00) Dollars and for Seventy-three and 70/100 ($73.70) Dollars costs in said suit, making a total of Nineteen Thousand Five Hundred Seventy-three and 70/100 ($19,573.70) Dollars, and from the whole of said judgment; 141

"AND WHEREAS, the said appellant, Singer Sewing Machine Company, a corporation, is desirous of staying the execution of said judgment so appealed from;

"NOW THEREFORE, the undersigned American Surety Company, a corporation authorized to, and doing business in the State of Idaho, in consideration of the premises and of such appeal on the part of said appellant, Singer Sewing Machine Company, a corporation, does hereby acknowledge itself firmly bound in the sum of twenty-five thousand

($25,000) Dollars, gold coin of the United States, that if the said judgment appealed from, or any part thereof, be affirmed, or the appeal dismissed, the appellant will pay in gold coin of the United States of America, the amount directed to be paid as to which said judgment shall be affirmed, if affirmed only in part, and all damages and costs which may be awarded against the appellant upon the appeal, and that if the said appellant does not make such payment within thirty days from the filing of the remittitur from the
143 Supreme Court in the court from which the appeal is taken, judgment may be entered on motion of the respondents in their favor and against the undersigned surety for the said sum of Nineteen Thousand Five Hundred Seventy-three and 70/100 ($19,573.70) Dollars, together with the interest that may be due thereon and the damages and costs which may be awarded against the said appellant, Singer Sewing Machine Company, upon the appeal.

"In Witness Whereof, the said American Surety Company, has caused its name and seal to be attached hereto by its proper offi-
144 cers and agents at Boise, Idaho, this 28th day of August, 1928.

American Surety Company of New York

by Howard E. Stein,
Attorney-in-Fact."

In the supreme court the judgment was affirmed as to Anderson but reversed as to Singer Sewing Machine Company. The remittitur was filed in the district court on May 22, 1930. Pursuant to the remittitur, on May 24th the district court en-

tered judgment dismissing the case as to Singer Sewing Machine Company. On June 23d the appellants Baldwin moved for judgment against the American Surety Company on the undertaking, which they claimed stayed execution on the whole judgment. This motion was granted and judgment accordingly was entered. Thereafter the American Surety Company moved to vacate and set aside said judgment on the grounds that it was, (1) void; (2) contrary to good conscience, and (3) was entered without notice to the American Surety Company. The motion was granted 146 and an order entered whereby said judgment was declared null and void, and was annulled, vacated and set aside. From this order the present appeal was taken.

Many assignments of error are made, but so far as this appeal is concerned we deem it necessary to consider only those which challenge the ruling of the lower court to the effect that the judgment against the Surety Company on the undertaking was void.

The briefs on both sides very ably and in great detail discuss the legal effect of the different pro- 147 visions of the bond in light of the nature of the appeal. The appellants claim that the undertaking by its terms superseded and stayed execution upon the whole judgment and is conditioned to pay any part thereof affirmed by the supreme court, and that such being the conditions of the bond its recital of introductory facts is misleading and not controlling. On the other hand the respondents devote the major portion of their brief to the contention that the recital of facts in the introductory part of the undertaking gov-

erns the condition and obligation of the undertaking; that such recitals limit the stay of execution to the Singer Sewing Machine Company only, and the obligation is to pay only such judgment in whole or in part as might be affirmed against the Singer Sewing Machine Company.

We disclaim any intention or right to construe the legal effect of the undertaking in question further than to examine it in aid of determining the sole question of the court's jurisdiction to hear and determine the motion for judgment
149 thereon.

The surety company did not claim error, and appeal. It did not claim inadvertence or mistake. It challenged the court's jurisdiction and moved to set aside the judgment as void. The whole question here is a question of jurisdiction. Nothing further. Nothing else.

If a court has jurisdiction of the parties, jurisdiction of the subject matter and jurisdiction of an issue of law or fact presented, then its judgment upon that issue is not void whether erroneous or not. Such judgments in the absence of mis-
150 take or, in a proper case, motion for new trial, may be corrected only by appeal. Bunnell and Eno, etc., Co. *v.* Curtis, 5 Ida. 652, 51 Pac. 767; Taylor *v.* Hulett, 15 Ida. 265, 97 Pac. 37; Wyllie *v.* Kent, 28 Ida. 16, 152 Pac. 194; United States Nat. Bank *v.* Eldredge, 49 Ida. 363, 288 Pac. 416.

Regarding notice: Where a supersedeas undertaking for stay of execution is filed pursuant to C. S. sec. 7155, it is held the surety becomes a party to the action and if the judgment stayed by the undertaking is affirmed in whole or in part

and remains unsatisfied for thirty days the judgment creditor may move in the action for judgment on the undertaking against the surety, and it is unnecessary to give the Surety company notice of such motion. Empire State-Idaho Min. & Developing Co. *v.* Hanley, 136 Fed. 99; U. S. Fidelity & G. Co. *v.* Ft. Misery Highway Dist., 22 Fed. (2d) 369; Gray *v.* Cotton (Cal.), 162 Pac. 1019; Portland Trust Co. *v.* Havely (Ore.), 61 Pac. 346.

It is claimed by respondent that these authorities are not in point because the legal effect of an 152
undertaking is the same as that of a bond in that the party executing the undertaking is simply surety for a principal; that in this case the introductory recitals of the undertaking disclose that the principal is the Singer Sewing Machine Company, and that upon the action being dismissed as to it such dismissal was also a dismissal as to the Surety company. We cannot accept this view. The undertaking is a complete independent contract. The obligation of its maker is not collateral or secondary. Moffat *v.* Greenawalt (Cal.), 153
27 Pac. 296. Its obligations are to be determined from the instrument itself. If the contract stayed the whole judgment and promised in consideration thereof to pay any part thereof affirmed in the supreme court which remained unpaid thirty days after the remittitur was filed, it remains a party to the action and liable until that obligation is satisfied.

As to jurisdiction of the subject matter of the motion: It is urgently claimed by the respondent that the district court was without jurisdiction to

render the judgment on the undertaking which was entered. As we understand respondent's argument on this phase it is to the effect that it becomes necessary for this court to construe the bond to determine whether the district court had jurisdiction to enter the judgment. Quoting from Freeman on Judgments, 5th Ed., Vol. 1, pp. 444-445, respondents' argument proceeds:

> "'Aside from these cases in which the purported judgment is in reality no judgment, and considering those cases in which there has
155 been an attempt at judicial action by a competent court, a judgment is not regarded as void unless there was a total lack of jurisdiction to render it. There are in general three jurisdictional elements in every valid judgment namely, jurisdiction of the subject matter, jurisdiction of the person, *and the power or authority to render the particular judgment.* For the absence of any one of these elements, when properly apparent, the judgment may be vacated at any time, whether before or after the term or the time limited by statute for motions on statutory grounds, either on motion or of its own volition without sugges-
156 tion.'"

The phrase in italics may be misleading. This matter is somewhat clarified by the quotation from Gile *v.* Wood, 32 Ida. 752, 188 Pac. 36, as follows:

> "In addition to the jurisdiction of the parties and the subject matter, it is necessary to the validity of a judgment that the Court should have jurisdiction of the question which its judgment assumes to decide, or of the particular remedy or relief which it assumes to grant."

In the Gile case an action was brought for the foreclosure of a mortgage. No allegation of indebtedness of defendant to plaintiff was contained in the complaint or claim made for a deficiency judgment. Nevertheless in the decree deficiency judgment was given. On motion, this provision of the decree was stricken as void for want of jurisdiction to award deficiency judgment. Had a question of right to deficiency judgment been presented to the court, and had the right to such relief been dependent upon a judicial construction, 158
a very different question would have arisen on the motion to declare void. In such case clearly there might have been error but the judgment would not have been void. The vice in Gile *v.* Wood which rendered part of the judgment void was that the court adjudged there was a right to deficiency judgment though no such question was submitted to the court. The court's jurisdiction was not dependent upon a proper construction of any document. It was dependent upon the question of whether right to deficiency judgment was submitted to the court. That issue not being presented the judgment upon it was held to be void 159
for want of jurisdiction to adjudge it, and it was set aside on motion. See also Maloney *v.* Zipf, 41 Ida. 32, 237 Pac. 632.

In the case at bar the only question presented to the court was as to right to judgment on the bond which was presented to the court by appellants in the manner provided by statute for the submission of that issue. This challenged judicable inquiry.

160 *Opinion by McNaughton, J.*

The question or issue presented was, did the Surety company, in its undertaking, become a party liable for every part of the judgment appealed from which might be affirmed by the supreme court, or did it stipulate only as to such judgment or part thereof as might be affirmed against the Singer Sewing Machine Company? To answer this question the court must look to the bond. The issue required a construction of the bond as a whole. The trial court had juris-
161 diction of this question. It construed the bond in favor of appellants and against the Surety company. It was not only in that court's power, but it was its duty, to decide the question submitted. *In re* Clerf (Wn.), 104 Pac. 622; Windfrey *v.* Benton (Okla.), 106 Pac. 853. Whether it decided right or wrong its decision was a judgment which could be reviewed for error, if there was error, only by this court on appeal. Bunnell and Eno, etc., Co. *v.* Curtis, *supra;* Taylor *v.* Hulett, *supra;* Wyllie *v.* Kent, *supra;* United States Nat. Bank *v.* Eldredge, *supra.* On appeal the question could
162 be re-examined. The undertaking cannot be examined and its legal effect as to this issue be determined by us on this appeal. We may consider it only insofar as to determine whether its wording is such that it afforded color of legal right in appellants to judgment. That is to say, whether appellants' motion presented a legitimate question and was not an imposition or fraud upon the court. We think, regardless of what our construction of the bond might be, it cannot be said appellants held no right to submit the question. Nor can it be said that such submission was a

fraud upon the court and on that ground its judgment was void.

We find the trial court, upon the motion for judgment on the bond, had jurisdiction of the parties and jurisdiction of the subject matter; that an issue was presented and it had jurisdiction to construe the undertaking and decide the issue which its judgment assumes to decide. It follows the judgment was not void, even if erroneous in the construction, and that the trial court committed error in annulling and vacating it as void. 164

The order vacating the judgment is reversed, with costs to appellants.

Lee, C.J., Givens and Varian, JJ., concur.

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## Dissenting Opinion by Budge, J.

May 2, 1931.

BUDGE, J., dissenting.

In extension of the facts stated in the majority opinion, it appears that Vivian F. Baldwin and her husband instituted an action in the district court against the Singer Sewing Machine Company, a corporation, and one Anderson, to recover damages for personal injuries alleged to have been sustained by Vivian F. Baldwin as a result of being struck by an automobile driven by Anderson. The complaint alleged that at the time of the accident Anderson was an agent of the sewing machine company acting within the scope of his employment. From a judgment against the 165

166 *Dissenting Opinion by Budge, J.*

sewing machine company and Anderson an appeal was taken to this court, resulting in a reversal of the judgment against the sewing machine company and affirmance of the judgment against Anderson.

To stay execution of the judgment of the trial court against the sewing machine company pending appeal, the American Surety Company executed a supersedeas bond, in terms as set out in the majority opinion. Upon the going down of the remittitur of this court, filed in the office of
167 the clerk of the district court May 22, 1930, and in compliance therewith, the trial court "ordered, adjudged and decreed . . . that the plaintiffs Vivian F. Baldwin and E. R. Baldwin take nothing from defendant Singer Sewing Machine Company, and that the said cause of action be, and the same is hereby dismissed as to the defendant Singer Sewing Machine Company, a corporation."

On June 23, 1930, upon *ex parte* motion, appellants here, before a judge other than the other who tried the original action, procured a judgment to be entered against the American Surety
168 Company on the supersedeas bond. On June 26, 1930, upon notice and motion, respondents moved the court to set aside and vacate the judgment theretofore entered against the American Surety Company, upon three grounds, (1) that the judgment was void; (2) that it was contrary to good conscience; and (3) that it was entered without notice to the American Surety Company. After a hearing and due consideration of the motion, and affidavit filed therewith, the court made the following order:

"Now, therefore, it is hereby ordered, adjudged and decreed, that that certain judgment made and entered in the above entitled cause on June 23, 1930, against the American Surety Company of New York, a corporation, in the sum of $22,357.21, together with interest thereon at the rate of seven per cent per annum from date until paid, be, and the same hereby is, vacated, annulled and set aside, and the same is hereby declared to be null and void, and the execution issued pursuant thereto be, and the same hereby is quashed and recalled." 170

This appeal is taken from the above order.

In the majority opinion it is held that the lower court had jurisdiction to enter the judgment upon the supersedeas bond and that its action in this regard is not subject to be reviewed by notice and motion, but on appeal. This position to my mind is not tenable. This court has now before it the identical record it would have, had an appeal been taken. If the judgment entered upon the supersedeas bond is void upon its face and it so appears from the record, it was subject to attack upon notice and motion, or it was within the 171 power of the trial court, upon its own motion, independent of any statute, to vacate the judgment. Gile *v.* Wood, 32 Ida. 752, 188 Pac. 36; Nixon *v.* Tongren, 33 Ida. 287, 193 Pac. 731; Miller *v.* Prout, 33 Ida. 709, 197 Pac. 1023; 15 Cal. Jur., pp. 52-53, Sec. 141; Dubois *v.* Clark (Colo.), 55 Pac. 750. Even though the judgment was not void upon the face of the record, it was nevertheless subject to be vacated upon motion made within a reasonable time by a showing of lack of

jurisdiction of the court to enter it. Armitage *v.* Horshoe Bend Co., 34 Ida. 179, 204 Pac. 1073; Nixon *v.* Tongren, *supra;* Norton *v.* Atchison, T. & S. F. R. Co. (Cal.), 30 Pac. 585, 32 Pac. 452, 33 A. S. R. 198; 14 Cal. Jur., pp. 1024, *et seq.*

The supersedeas bond upon its face and throughout its contents shows clearly that it was given to stay execution upon the judgment and the whole thereof entered against the sewing machine company. Anderson's name nowhere appears in the bond, and in order to uphold the
173 judgment entered upon the supersedeas bond it becomes necessary for the court to read into the bond that it was given to stay execution of the judgment against Anderson as well as against the sewing machine company. This the court has no authority to do.

It is fallacious to contend that under a judgment joint in form but in fact and in law joint and several against two or more defendants, a stay of execution on such judgment in favor of one of the defendants pending an appeal is a stay of execution as against all of the defendants. It is like-
174 wise illogical to contend that a supersedeas bond stays proceedings in favor of a person not named in the bond. Appellants were in a position at any time from the entry of the original judgment against the sewing machine company and Anderson to execute upon the judgment against Anderson, the latter having furnished no supersedeas bond. C. S. secs. 7155, 6902 (amended, Sess. Laws 1929, p. 70); 23 C. J., p. 533; 3 C. J., p. 1324, Sec. 1451; 2 Cal. Jur., p. 472, Sec. 222; Drabant *v.* Cure (Pa.), 124 Atl. 340; State *v.* Beveridge

(Or.), 218 Pac. 1112; Bergevin *v.* Wood (Cal.), 105 Pac. 935; *Ex parte* French, 100 U. S. 1, 25 L. Ed. 529.

The supersedeas bond is the foundation of the judgment obtained thereon and must be interpreted from its four corners. The surety is entitled to have his bond strictly construed. His liability cannot be extended by implication. He has a right to stand upon the exact words of his contract, and his liability is limited to the language of his bond. City of Pocatello *v.* Fargo, 176
41 Ida. 432, 242 Pac. 297; Jackson *v.* Barrett, 12 Ida. 465, 86 Pac. 270. With this principle in mind the bond should be examined for the purpose of determining whether the court had jurisdiction to enter the particular judgment. The court must not only have jurisdiction of the person and the subject matter but power and authority to render the particular judgment. In the opening of the bond we find this language:

> "Whereas, the defendant Singer Sewing Machine Company, a corporation, in the above entitled action has appealed to the Supreme Court of the State of Idaho from the 177
> judgment made and entered against it in the above entitled action in the above entitled court in favor of the plaintiffs in said action
>
> . . . and from the whole of said judgment."

The whole of said judgment against the Singer Sewing Machine Company, not the whole of the judgment against Anderson. Anderson is an entire stranger to the American Surety Company. That he was never thought of when the supersedeas bond was given is a fact apparent from the

178 *Dissenting Opinion by Budge, J.*

entire record. To read his name into the bond or to create a liability against the American Surety Company by reason of the fact that the judgment was rendered against Anderson and the Singer Sewing Machine Company is to do violence to the language of the bond. No language could be plainer to my mind, from a reading of the bond, than that it was the intention of the American Surety Company to furnish a supersedeas bond for the Singer Sewing Machine Company alone. Had it intended to furnish a bond
179 for both the sewing machine company and Anderson, language would have been used to that effect. It names the Singer Sewing Machine Company in its bond, it refers to the judgment entered against the sewing machine company in its bond, and the bond is given to stay execution against the whole of the judgment entered against the sewing machine company. This is further emphasized by the next paragraph of the bond, which is as follows:

> "And whereas, the said appellant, Singer
> 180 Sewing Machine Company, a corporation, is desirous of staying the execution of said judgment so appealed from."

What judgment? The judgment appealed from by the Singer Sewing Machine Company. We must look to the whole instrument to gather the intention of the parties, the preamble as well as the condition of the bond, and particularly is this true where there is doubt. The condition of the bond is even more explicit than the preamble in limiting liability on the bond to a stay of execu-

tion against the Singer Sewing Machine Company. It is as follows:

> "Now, therefore, the undersigned American Surety Company, a corporation authorized to, and doing business in the State of Idaho, in consideration of the premises and of such appeal on the part of said appellant, Singer Sewing Machine Company, a corporation, does hereby acknowledge itself firmly bound in the sum of Twenty-five Thousand ($25,000.00) Dollars, gold coin of the United States, that if the said judgment appealed
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> from, or any part thereof, be affirmed, or the appeal dismissed, the appellant will pay in gold coin of the United States of America, the amount directed to be paid as to which said judgment shall be affirmed, if affirmed only in part, and all damages and costs which may be awarded against the appellant upon the appeal, and that if the said appellant does not make such payment within thirty days from the filing of the remittitur from the Supreme Court in the court from which the appeal is taken, judgment may be entered on motion of respondents in their favor and against the undersigned surety for the sum of Nineteen Thousand Five Hundred Seventy-
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> three and 70/100 ($19,573.70) Dollars, together with the interest that may be due thereon and the damages and costs which may be awarded against the said appellant, Singer Sewing Machine Company, upon the appeal."

It affirmatively appears from the condition of the bond as above set out that the bond was given solely for the purpose of staying execution against the Singer Sewing Machine Company, with the amount of the judgment payable only in the event

184 *Dissenting Opinion by Budge, J.*

the judgment against the Singer Sewing Machine Company or any part thereof be affirmed. If the judgment against the sewing machine company had been affirmed in part the bond would be answerable to the extent of the affirmance.

The bond is unambiguous and clearly determines the liability of the surety. There is no room for construction and no justification for holding that the bond will be considered no further than to examine it in aid of determining the sole question of the trial court's jurisdiction to
185 enter judgment on the bond. Even under such a technical view there is ample justification for holding that the judgment entered on the supersedeas bond was void. But the majority opinion actually construes the bond and its legal effect and holds that because the judgment was affirmed as to Anderson, it was affirmed in part and the surety is liable.

To recapitulate, we have this situation: The district court had no jurisdiction over the Singer Sewing Machine Company after the judgment against it had been set aside in this court. The
186 rule is that when an order is entered in an appellate court reversing a judgment it is forthwith vacated and no longer remains in existence. 2 R. C. L., p. 270, Sec. 222. When the judgment was set aside as to the sewing machine company, the American Surety Company could not be liable because its principal had been dismissed. 1 Freeman on Judgments (5th Ed.), p. 1026; Sec. 466; Howell *v.* Alma Milling Co., 36 Nebr. 80, 38 A. S. R. 694, notes, pp. 702-712; First Nat. Bank *v.* Rogers, 13 Minn. 407, 97 Am. Dec. 239; Burnham

*v.* Edwards (Okl.), 257 Pac. 788. The bond upon its face, in unmistakable language, shows that it was given to stay execution against the Singer Sewing Machine Company and for no one else, and the court therefore had no authority to construe the bond to include the judgment against Anderson. The judgment against the surety company on the supersedeas bond was therefore void when entered, and was subject to attack by motion to, and was properly set aside.

No other result can follow from the holding of the majority than a miscarriage of justice, and it is repugnant to both the state and federal constitutions in that the surety company is deprived of its property without due process of law. 188

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190 No. 5653

IN THE

SUPREME COURT OF THE STATE OF IDAHO.

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VIVIAN F. BALDWIN and E. R. BALDWIN,
*Appellants,*

*vs.*

ED. ANDERSON and THE AMERICAN SURETY COMPANY OF NEW YORK, a corporation,

191 *Respondents.*

---

**PETITION FOR REHEARING OF RESPONDENT AMERICAN SURETY COMPANY OF NEW YORK.**

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Appeal from the District Court of the Third Judicial District of the State of Idaho, in and for Ada County.

HON. CHARLES F. KOELSCH, *District Judge.*

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Supreme Court of Idaho
Filed
May 22 1931
CLAY KOELSCH,
Clerk

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## Petition for Rehearing.

No. 5653

IN THE

SUPREME COURT OF THE STATE OF IDAHO.

VIVIAN F. BALDWIN and E. R. BALDWIN,
Appellants,
*vs.*
ED. ANDERSON and THE AMERICAN SURETY COMPANY OF NEW YORK, a corporation,
Respondents.

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*To the Honorable, The Supreme Court of the State of Idaho:*

Your petitioner, American Surety Company of New York, respondent in the above cause, respectfully petitions this Honorable Court to grant a rehearing in said cause and as a basis for such petition your petitioner earnestly submits that this Court in its decision filed herein on May 2, 1931, erred in the following respects:

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I.

The gist of the decision is that where a judgment is entered against A and S from which both appeal but only S gives an undertaking to stay proceedings against it pending the appeal, the trial court may, after the Supreme Court has set

aside the judgment against S, enter judgment against the surety under Section 7155, without notice, upon failure of *A* to pay the judgment as against him within 30 days after the filing of the remittitur. In so holding, we think the Court erred because:

(a) The trial court had no jurisdiction over the person of the surety, for the latter had *consented* to judgment against it only in the event *S* failed to pay the judgment against it if affirmed on
197 appeal;

(b) When the judgment against S was set aside on appeal, the surety was no longer a party to the cause and the entry of judgment 30 days later, without notice, against the surety deprived it of its property without due process of law, and denied to it the equal protection of the law, contrary to the provisions of both the State Constitution and the Fourteenth Amendment to the Federal Constitution;

(c) Section 7155 was a part of the surety's
198 undertaking and the judgment against the surety must come strictly within the terms of that statute, otherwise it is obviously void for the surety is liable only in the event the appellant, in whose behalf the undertaking was given, fails to pay if the judgment against him be affirmed on appeal. When the judgment is set aside, the undertaking becomes *functus officio* and the surety may go its way. The original judgment against A and S was entered on May 31, 1928. The remittitur setting aside the judgment against S was filed in the District Court on May 22, 1930, and two days

later the trial court dismissed the action as against S. On June 23, 1930, the court *ex parte* and at appellants' request entered judgment against the surety (for S) for failure of *A* to pay the judgment against *him*. Clearly, the surety was not in court on June 23rd and the judgment against it was void for lack of jurisdiction of the person and for lack of jurisdiction to render the particular judgment awarded.

II.

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In entering judgment against a surety under Section 7155 C. S., the District Court was acting under a special statutory power resting solely upon the consent of the surety; its jurisdiction was limited and special and all elements necessary to confer jurisdiction must affirmatively appear from the record. Hence, this Court erred in holding that jurisdiction would be presumed and that it would not examine or construe the undertaking or determine whether the District Court had jurisdiction of the person or power to render judgment against the surety. 201

III.

The distinction made by this Court between "bonds" and "undertakings" on appeal is without precedent. Both are contracts of suretyship. Both are used interchangeably in the statutes and in the decisions of this Court and other courts. The ancient distinction has long since been eliminated. At common law a bond on appeal was an instrument under seal for a fixed penalty, while an undertaking was an unsealed contract for an

amount to be later ascertained and assessed, and where, as in Idaho, all distinction between sealed and unsealed instruments is abolished, the terms are used interchangeably, and the rule that one cannot recover against the surety unless he can also recover against the principal applies to both bonds and undertakings. Whether the principal joins or does not join, does not affect the surety's liability or the right of the obligee under Section 7155. The right to enter judgment against the surety under that Section depends upon the pro-
203 visions of the statute and not upon the ancient rule of the common law.

IV.

This Court erroneously assumed that the surety has the right of appeal from a judgment entered against it under Section 7155, whereas the law is well settled that one cannot appeal from a *consent* judgment and a judgment against a surety under that Section is a consent judgment except where the judgment goes beyond the surety's consent or the contract of suretyship, in which case it is void
204 as having been entered without jurisdiction—without notice, process or consent, and hence deprives the surety of its property without due process of law.

V.

Where judgment is entered without notice or process, or without consent or waiver (as in the case of undertakings on appeal), the Court is without jurisdiction of the person and judgments so entered are void and the mode of attack or pro-

cedure for review, sustained by the great weight of authority, is by direct attack or motion to vacate. This procedure calls the claimed error to the attention of the Trial Court and affords it an opportunity to correct any error committed and brings for review in the appellate court only such errors as the Trial Court has refused to correct after opportunity duly afforded. Such procedure rests on the basic, fundamental, and long established principles of appellate practice; and this Court erred in establishing a practice which affords the Trial Court no opportunity to correct 206
jurisdictional errors in *ex parte* judgments.

VI.

The decision of this Court deprives your petitioner of its property without due process of law and denies to it the equal protection of the laws, contrary to the Fourteenth Amendment to the Constitution of the United States, for it in effect holds that the judgment was entered against it under the undertaking given under Section 7155 and hence is a consent judgment from which no 207
appeal would lie, and it denies to petitioner the right to challenge it by direct attack or motion to vacate which is the uniform practice where judgments are void for lack of jurisdiction, and it is the practice that has been repeatedly sanctioned and approved by this Court and upon which decisions petitioner had a right to rely in this case.

VII.

This Court holds in substance that if the Trial Court in entering the *ex parte* judgment had pre-

sented to it a question that "challenged judicable inquiry", or if the undertaking "afforded color of legal right in appellants to judgment", then the surety should have appealed from the judgment, whereas if the question did not "challenge judicable inquiry", or if the undertaking did not afford "color of legal right in appellants to judgment", then the judgment would be void and the surety had no right to attack it by motion to vacate. Obviously, this injects an innovation into the law of appellate procedure. The surety must at its
209 peril select the right procedure and as a precaution it will both appeal from the judgment and also move to vacate it and then let this Court select which appeal it will entertain—either the appeal from the judgment or the appeal from the order vacating or refusing to vacate the judgment. Clearly, such practice would multiply appeals and the expense of litigation and create uncertainty, bewilderment and confusion. There will be much to condemn it and nothing to commend it. We think the Court erred in holding that the procedure in such cases must be deter-
210 mined by whether the record presents a "judicable inquiry", or "color of legal right"—phrases practically unknown to the law and incapable of such definite limitations as is required for the practical administration of justice.

## VIII.

The Court failed to apply either the letter or the spirit of Section 9444, C. S., which provides that:

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> "The Compiled Laws establish the law of this State respecting the subjects to which they relate, and their provisions and all proceedings under them are to be liberally construed, with a view to effect their objects and to promote justice."

The result of the Court's decision is to disregard justice and legal rights and to reverse the trial court without examining the record, although it is the identical record that would be before the Court if the matter came up on the appeal from 212
the judgment instead of from the order vacating the judgment. Obviously the decision sacrifices substance for form to the extent of holding the surety liable on an unconscionable *ex parte* judgment which the trial court had set aside because it was based on a bond which the surety had not given. This miscarriage of justice the Court justifies on distinctions and refinements which we think are not supported by authority and contrary to the mandate of the above statute that the provisions of the Code and the proceedings under it should be liberally construed with a view to 213
promote justice.

We will endeavor to present as briefly as possible some of the authorities sustaining the above points and petitioner's contention that this cause should be given further consideration by this Court.

214 *Petition for Rehearing.*

## BRIEF OF THE AUTHORITIES.

### The Court in Statutory Proceedings Has Limited Jurisdiction Which Must Affirmatively Appear From the Record.

The power to render a summary judgment against the surety on a supersedeas undertaking without notice rests upon the statute and the consent of the surety as expressed in its undertaking.

215 C. S., Sec. 7155;
California Code Civil Procedure, Sec. 942;
2 California Jurisprudence, 1084-1087;
4 C. J. 1305-1307.

In 2 Calif. Juris., pages 1085-1086, it is said:

> "A proceeding to enforce an undertaking by motion is a statutory proceeding and the course pointed out by the statute must be strictly followed."

216 See:

Hansen *vs.* Martin, 63 Calif. 282;
Reay *vs.* Butler, 118 Calif. 150, 50 Pac. 375;
Churchill *vs.* More, 7 Calif. App. 767, 96 Pac. 108.

The Court in exercising this special statutory power to render summary judgment without notice or hearing is not acting according to the course of the common law, its judgment is prop-

erly treated as that of a court of limited jurisdiction, everything necessary to give jurisdiction must appear by the record, and no presumptions can be invoked to supply any omissions from the record.

In the case of Wright *vs.* Atwood, 33 Ida. 455, 195 Pac. 195, this Court, at page 461 of the Idaho Report, definitely establishes the rule applicable to such cases as follows:

> *"When a court of general jurisdiction has special and summary powers wholly derived from statute, and not according to the course of the common law, and which do not belong to it as a court of general jurisdiction, its judgments are regarded and treated as those of courts of limited and special jurisdiction, and everything necessary to give jurisdiction must appear by the record; while everything will be presumed to be without jurisdiction which does not appear by the record to be within it.* (Morse v. Presby, 5 Fost. (25 N. H.) 302.)" (Our italics.) 218

In the case of Platts *vs.* Platts, 37 Ida. 149, 215 Pac. 454, an opinion rendered by Judge Givens as Commissioner, and approved by the Supreme Court, the above doctrine was again announced, and numerous authorities from various jurisdictions amply sustaining it were cited, and it is pointed out that no presumptions can be invoked to supply any omissions in the record in such cases. 219

It should be noted further that in entering a judgment pursuant to Section 7155 and similar Statutes, the power of the Court to do away with notice and hearing is based upon the consent of

the surety as evidenced by its undertaking and such consent derives its efficacy from the statute.

4 C. J., 1307;
2 Calif. Juris., 1086;
U. S. F. & G. Co. *vs.* Fort Misery Highway Dist., 22 Fed. (2d) 369;
Meredith *vs.* Santa Clara Mining Ass'n, 60 Calif. 617;
Gray *vs.* Cotton, 162 Pac. 1019;
Portland Trust Co. *vs.* Havely (Ore.), 61
221 Pac. 347.

These authorities, several of which are cited with approval in this Court's opinion, all hold that the execution of the statutory undertaking amounts to the entering of an appearance by the surety, making it a quasi party to the suit in which the undertaking is given, and further amounts to a consent that judgment may be entered against the surety upon the happening of the contingency specified in the undertaking. That the surety's appearance is a limited and special appearance
222 for the purpose and on the conditions named in the undertaking and no other is fully sustained by all these authorities and especially emphasized in Portland Trust Co. *vs.* Havely, *supra,* where the Court says at page 347:

> "Further than this, the surety, by entering his name upon the appeal bond, expressly covenants, in view of the statute, that judgment shall be entered against him if the appellant, his principal, fails to sustain the appeal. Beall *v.* New Mexico, 16 Wall. 535, 21 L. Ed. 292. By so doing, he makes himself a party to the record, and no further notice

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is necessary to sustain or establish the jurisdiction of the court in the entry of judgment or decree against him *according to the nature of his undertaking. He is as much bound by the judgment as is his principal.* Holbrook *v.* Investment Co., 32 Or. 104, 51 Pac. 451; Brauer *v.* City of Portland (Or.), 60 Pac. 378." (Our italics.)

It will be noted that the Oregon Court emphatically says that the surety's appearance in the case and his consent is "*according to the nature of his undertaking*", and further that the Court 224
says the surety "*is as much bound by the judgment as is his principal.*" In other words, the surety stands in the same position as his principal and cannot be held liable unless the principal is liable and if the principal is dismissed, the surety is dismissed.

In the present case as the lower court was not acting according to the course of the common law but in the exercise of this special and summary power wholly derived from statute, and as the surety's consent to jurisdiction was based solely upon the terms of its undertaking, everything
necessary to give the lower court jurisdiction must 225
affirmatively appear by the record. Everything which does not appear by the record will be presumed to be without jurisdiction and no presumptions can be invoked to supply omissions. The record upon which the validity of the judgment of June 23, 1930, must be determined consists of the judgment originally appealed from, the undertaking itself evidencing the surety's consent, the remittitur from this Court with the district court judgment entered pursuant thereto, and the judg-

226 ment in question. The surety's consent and submission to the jurisdiction is based solely upon its undertaking and unless that undertaking shows affirmatively that the surety consented to judgment upon the contingency that actually happened, the lower court lacked both jurisdiction of the person of the surety and jurisdiction and power to give the judgment rendered regardless of whether appellants, who were plaintiffs below, asked for it or not. Obviously, therefore, the jurisdiction of the district court to enter the judg-
227 ment cannot be ascertained without construing the undertaking, an assential part of the record on which that judgment is based, not merely for the purpose of determining whether it presented a "judicable inquiry" or "color of legal right" to the judgment, as suggested in this Court's opinion, but necessarily for the purpose of determining whether or not jurisdiction in the lower court exercising a special statutory power actually existed and the contingency stipulated in the undertaking as the basis of the surety's consent to jurisdiction had occurred.

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**District Court Had No Jurisdiction of Person of Your Petitioner.**

As already pointed out, the essential elements of jurisdiction must appear affirmatively in this special statutory proceeding or the judgment entered is void and jurisdiction of the person of your petitioner necessarily rests upon its implied consent as evidenced by its undertaking and in accordance with the nature thereof. Jurisdiction of the person of a defendant is universally recog-

nized as an absolute essential to a valid judgment and this Court so held in the opinion herein.

Ordinarily, jurisdiction of the person is obtained by service of process and in such cases a return of service makes a *prima facie* case of jurisdiction of the person. It is pointed out, however, in respondent's printed brief (pp. 64-71) that on a direct attack such as by motion to vacate a judgment, there is no presumption of jurisdiction of the person and even though the record purports to show such jurisdiction, the defendant may prove that jurisdiction of the person was not 230 in fact obtained as required by law. We need not repeat these authorities here as the question has been finally determined by this Court in Armitage *vs.* Horseshoe Bend Mining Co., 34 Ida. 179, 204 Pac. 1073, and in California by Norton *vs.* Atchison etc. Ry. Co., 97 Calif. 388, 30 Pac. 585, 32 Pac. 452.

In the case at bar the jurisdiction of the lower court over the person of your petitioner rested solely upon the consent evidenced by its undertaking and it is obviously impossible to determine the question without construing that undertaking 231 and determining its nature and extent. The lower court construed this undertaking for the first time on the motion to vacate the judgment and held the judgment void because it was not within the consent. This Court in the opinion herein disclaimed any intention or right to construe the legal effect of the undertaking to determine jurisdiction of the person and expressly states that it could not examine the undertaking and determine its legal effect as to whether by its terms petitioner became

232 a party liable for every part of the judgment appealed from or only in the event that such judgment should be affirmed against the Singer Sewing Machine Company. May we ask how this Court can determine whether the District Court had jurisdiction of the person of your petitioner unless it examines and construes the legal effect of the undertaking in this regard? Certainly it cannot be said that the District Court in this special statutory proceeding, where every essential to jurisdiction must affirmatively appear, had
233 jurisdiction because it entered the judgment of June 23, 1930. To do this we most respectfully suggest would be to deny petitioner the equal protection of the law and to deprive it of property without due process of law in violation of both the State Constitution and the Fourteenth Amendment to the Federal Constitution and surely the *ex parte* determination of the lower court on the motion alleged to have been made by appellants and as to which the record is silent, cannot be considered as outweighing the ultimate determination of the Court on the contested mo-
234 tion to vacate the judgment, at which time the same Judge who entered the *ex parte* judgment vacated it for lack of jurisdiction.

This Court, however, avoids the paramount issue of jurisdiction of the person of your petitioner by attempting a distinction between the legal effect of bonds and undertakings on appeal and by the broad assertion that the latter is a complete independent contract and the obligation of its maker is not collateral or secondary. Does the Court mean to say that because the undertak-

ing was "a complete independent contract" and the obligation of its maker was "not collateral or secondary", that it is not a contract of suretyship, and if not a contract of suretyship what kind of a contract is it?

The only authority cited for this entirely novel proposition is the California case of Moffat *vs.* Greenawalt, 27 Pac. 296, and a brief reference to that case is necessary. There, defendant had appealed from a justice court judgment and given a supersedeas undertaking with two individual sureties in which he did not join. Plaintiff excepted to the sufficiency of the sureties, they failed to justify, the appeal was dismissed, and plaintiff sued them on the undertaking. The sureties urged that as the statute provided that where they failed to justify, the appeal must be regarded as if no such undertaking had been given, they could not be held, and further urged that as the appeal was not effectual for any purpose, it could not have been dismissed. The Court held that the contingency on which they agreed to be bound was that the judgment be affirmed or the appeal be withdrawn or dismissed, and as the latter event had happened, they were liable for breach of the condition of their contract. The Court states in the course of its opinion that the undertaking was an original and independent agreement on their part and in legal effect was entered into by them with the plaintiff. This statement is true to the extent that for breach of the condition of the undertaking the makers may be sued without joining their principal and regardless of his solvency or whether execution has been returned unsatis-

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fied against him. But neither the statement of the Court in that case nor the opinion herein can repeal the positive provisions of the governing statutes that an undertaking on appeal is to be executed by "sureties" whose obligation is to pay the judgment if it is affirmed or the appeal dismissed, provided the appellant fails to pay.

Section 7155 C. S. provides that the execution of the judgment cannot be stayed "unless a written undertaking be executed on the part of the appellant, *by one or more sureties*". Similar
239 provisions are found in Sections 7154, 7156, 7158, 7159 and 7161. The California Statutes under which the Moffat case was decided are practically identical and it would be a rash assumption indeed to assume that either the California Court or this Court intended to do away with the express statutory provisions referred to.

The universal definition of a contract of suretyship is that it is a direct contract to pay the debt of another. As said in 4 Words and Phrases (2d) at page 803:

240 "'Suretyship' implies original undertaking and the measure of liability is the extent of the principal's liability."

See also:

8 Words and Phrases, pp. 6809-6813.

In Hoffman *vs.* Habighorst, 38 Ore. 261, 63 Pac. 610, 53 L. R. A. 908, it is stated:

"Everyone who incurs a liability in person or estate, for the benefit of another, without sharing in the consideration, stands in the

position of a surety, whatever may be the form of his obligation."

The same Court further states that it is not necessary or essential that the primary obligor join in the contract with the sureties and numerous authorities to sustain this point are quoted.

Clearly, the wording of our statutes that an undertaking is to be executed on behalf of the appellant by sureties means a contract of suretyship and nothing else. When the case of Moffatt *vs.* Greenawalt, *supra,* is examined, it is obvious 242
that the liability would have been enforced just the same if the judgment debtor had signed the undertaking. In that case the stipulated contingency had occurred and the makers of the undertaking were therefore liable. The obligation of the principal was evidenced by the judgment against him and he did not have to join in the undertaking.

The attempted distinction made in the same paragraph of the opinion between bonds on appeal and undertakings on appeal is insubstantial and imaginary and based no doubt upon the 243
argument advanced by appellants in their printed brief to this effect. None of the authorities sustain any such distinction, and courts, lawyers and laymen use the terms "bond" and "undertaking" interchangeably. In this connection, we wish to remind the Court that both in its opinion and in the printed brief of appellants in this cause the terms are also used interchangeably.

The word "undertaking" is thus defined in 2 Am. Eng. Enc. of Law, p. 98:

> "An undertaking is an engagement by one of the parties to a contract to the other and not the mutual engagement of the parties to each other."

In Scherer *vs.* Hopkins, 42 N. Y. St. Rep. 189, it is said:

> "An undertaking is but a simplified bond without a seal."

In Tenney *vs.* Taylor, 1 App. Cases D. C., 223,
245 it is said:

> "Unlike the ordinary appeal bond, which is an obligation under seal, with a fixed penalty, and a definite condition, limited to become effective or otherwise, by the determination of the appeal, the *undertaking* is without seal, or fixed penalty, and without condition, and is simply a promise or an assumption of liability to perform a judgment or to pay damages and costs." (Our italics.)

To the same effect see:

8 Words and Phrases, p. 7164;
246 1 Words and Phrases, pp. 832-834;
4 Words and Phrases (2d), p. 1053;
Wollenberg *vs.* Sykes, 49 Ore. 163, 89 Pac. 148.

The confusion in this matter arises from the fact that in California and states like Montana and Idaho, which have generally adopted the language of the California statutes, all distinctions between sealed and unsealed instruments are abolished, and at the same time the statutes expressly provide that undertakings on appeal shall

be executed on the part of the appellant, or on his behalf *by one or more sureties,* and do not require that they be executed by him, as he is already bound by the judgment.

In King *vs.* Pony Gold Min. Co. (Mont.), 62 Pac. 783, the Court points this situation out clearly at page 787:

> "*An undertaking to secure an appeal to the supreme court is technically a bond within the common-law definition, save that it is not under seal.* There is, however, no difference in this state between sealed and unsealed private writings. 248 It is not necessary at the common law that an instrument, to be a bond, must be executed by the person for whose default the obligors bind themselves to respond in damages, when he is not named as a party; nor is it essential that there be both principal and sureties. *Under our statutes an undertaking on appeal is a species of bond, and the two words are by judges, text writers, lawyers and laymen commonly used interchangeably.*" (Our italics.)

We will refer briefly to the other authorities on this alleged distinction cited by appellants in their 249 printed brief.

In *Ney* vs. *Orr*, 2 Mont. 559, the bond or undertaking was drawn to be executed by the principal but he failed to sign it. The instrument was, therefore, incomplete and the Court held the sureties not liable. Surely this case is no authority for the proposition that the surety may be liable though the principal is not.

In the King case, *supra*, the Court commented on the Ney case and expressly limited the effect of that decision to the particular facts.

250 In *Russell* vs. *C. B. & Q. Ry. Co.* (Mont.) 94 Pac. 501, erroneously cited in appellant's brief as "94 Pac. 488", it was held that a statute requiring official bonds to be executed by the principal and purporting to require all court bonds and undertakings to be so executed was unconstitutional, as applicable to appeal undertakings because the subject of appeal undertakings and court bonds generally was not within the title of the act nor germane to it.

In *Steele* vs. *Lovejoy* (Ill.) 17 N. E. 711, the
251 bond was executed by Claflin, the judgment debtor, as principal and Lovejoy as surety, and was a sealed instrument, hence it was clearly a bond. The statute of limitations on sealed instruments was ten years and other contracts five years, and defendant, Lovejoy, the surety, contended that as action on the judgment was barred the same rule should be applied to the bond. The Court held, however, that the bond was an agreement to pay the judgment, and the fact that the bond was also executed by the judgment debtor was not material. Being an express contract to pay the judgment if
252 the principal failed to do it, there was a clear liability and the statute of limitations as to sealed instruments was held to apply.

Clearly, none of these authorities lend the slightest color to the utterly indefensible proposition that an undertaking on appeal or a supersedeas undertaking is not a contract or suretyship to which the ordinary rules as to liability of principal and surety accordingly apply. If the condition of the bond or the condition of the undertaking, as the case may be, is broken, the surety is

liable, otherwise he cannot be held. It is wholly immaterial whether the instrument be an appeal bond under seal or an undertaking, the principal can join in either or fail to join, unless the particular statute requires his joinder, and the authorities which hold that no recovery can be had against the principal make no distinction whatever as to whether the instrument is under seal or not, or as to whether the principal signed it or not.

Thus, in the case of *First Nat. Bank* vs. *Rogers*, 13 Minn. 407, 97 Am. Dec. 239, cited at page 73 of respondent's brief, the instrument was evidently a bond under seal, executed by the debtor as principal and defendants as sureties. 254

In *Sharon* vs. *Sharon*, 83 Cal. 433, 23 Pac. 1102, it was an undertaking in accordance with the California statute. The Court says:

> "Tevis and Baldwin were the sureties on the undertaking given on the appeal from the judgment originally entered in this cause (75 Cal. 1, 16 Pac. Rep. 345), and when, on the 5th day of May, 1888, the plaintiff moved the court below for judgment against the present defendant, executor of the will of the original defendant, for alimony and costs, she also moved that the judgment be entered up as a judgment against the sureties, as well as against said defendant, and in entering the judgment it was so done. From the judgment so entered against them the sureties appeal. *So long as the plaintiff was not entitled to recover against the defendant, she could not recover against the sureties.* Parnell *v.* Hancock, 48 Cal. 452. On the authority of that case, and of Sharon *v.* Sharon, *ante*, 1100 (No. 12775, this day decided), the judgment en- 255

256 tered in this cause against Lloyd Tevis and E. J. Baldwin, June 23, 1888, upon the motion of the plaintiff, made May 5, 1888, is reversed, and the court below is directed to enter an order denying plaintiff's said motion." (Our italics.)

In Parnell *vs.* Hancock, 48 Cal. 452, the undertaking was evidently not executed by the principal. The Court says, at page 454:

257 "Before the defendants, as sureties of Porter, can be sued, Porter, their principal, must himself have become absolutely liable to pay the judgment in the County Court."

The Court then observes that plaintiff need not levy execution against the judgment-debtor before maintaining action against the sureties. It then continues, at page 455:

258 "But it is equally clear that, *unless the case be in such a condition as that the plaintiff might have issued an execution against the principal, had he desired to do so, he cannot proceed against the sureties on the appeal.* To hold that he could, would be to place the sureties in a position apparently less favorable than that occupied by their principal." (Our italics.)

In Burnham *vs.* Edwards (Okla.), 257 Pac. 788, cited at page 74 of respondent's brief, the Court refers to the instrument as a bond, and it was apparently executed by the principal, but the Court bases its decision on the general doctrine of suretyship and cites to sustain its ruling cases involving both bonds and undertakings.

In 2 Calif. Juris., pp. 1070-1071, in summarizing the California doctrine of liability upon undertakings on appeal, the author states:

> "It is thoroughly settled that the sureties on an undertaking on appeal or to stay execution may stand upon the strict letter of their contract. They can be held to no different contract from that into which they have entered * * *. *Any performance by the defendant that will discharge the judgment against him will operate as a discharge of the sureties, and any act of the plaintiff* 260 *that will release the defendant from the judgment will also release them, but so long as the plaintiff has the right to enforce the judgment against the defendant, he is entitled to enforce their obligation.*" (Our italics.)

Ample authorities to support these propositions are cited in the notes and among the recent California cases sustaining the doctrine that an undertaking on appeal is merely a contract of suretyship to which the ordinary rules applicable to principal and surety apply are:

> LaFleur *vs.* M. A. Burns Lmbr. Co., 188 Calif. 321, 205 Pac. 102; 261
> Hogan *vs.* Paddon (Calif.), 267 Pac. 392.

In both these cases the following statement is made:

> "The position of a surety on an undertaking on appeal is therefore similar to that of an ordinary surety on an obligation who has been regularly joined as a party defendant."

It follows from the above authorities that this Court was misled by the specious reasoning in

262 appellants' briefs into thinking that there was some fundamental distinction between a bond on appeal or any normal suretyship contract and an undertaking on appeal. The statute itself and the above authorities demonstrate conclusively that any such distinction is unreal and imaginary and further show that an undertaking on appeal or for a supersedeas is purely a contract of suretyship and that unless the plaintiff has a judgment which he can enforce against the principal, he is not entitled to judgment on the contract of the
263 surety. It is true that under the above authorities the undertaking may correctly be said not to be collateral or secondary in the sense that suit can be brought upon it or judgment entered without joining the principal and that it is unnecessary to show an unsatisfied levy of execution against him. Further than that the authorities do not go and they demonstrate absolutely that the contract is a contract of suretyship and the surety cannot be held liable unless the principal is liable, except possibly where the principal is released by operation of law as in the case of bankruptcy or
264 the statute of limitations.

On this phase of the case, therefore, we suggest most earnestly that this Court assumed that the lower Court had jurisdiction of the person of your petitioner without deciding it, that this Court could not find the existence of such jurisdiction without construing the undertaking and determining whether or not your petitioner's consent, as evidenced by the terms of its undertaking, conferred jurisdiction on the lower Court, that in this statutory proceeding jurisdiction of

the person cannot be presumed but must affirmatively appear from the record and accordingly the Court should grant a rehearing, construe the undertaking and determine whether or not the consent of the surety therein contained amounted to a consent to the entry of judgment in the event that the judgment originally appealed from should be affirmed as to Ed. Anderson and reversed as to Singer Sewing Machine Company.

**The Judgment Was Void Because the Lower Court Had No Power to Render That Particular Judgment.** 266

Like jurisdiction of the person, power to give the particular judgment rendered in this case depended upon Section 7155 C. S., and the consent of the surety in accordance with the nature of its undertaking, and like jurisdiction of the person, such power must affirmatively appear from the record in this special statutory proceeding and the existence of such power cannot be determined unless this Court examines and construes the undertaking.

267 Power to render the particular judgment awarded is absolutely essential to the validity of the judgment as shown in respondent's printed brief herein at pages 47-61, although it is frequently included under the general expression "jurisdiction of the subject-matter". This Court in a number of previous decisions has definitely established this rule and we respectfully submit that these decisions extending over a period of years should not be overruled by implication and by a mere assertion that the expression "power

or authority to render the particular judgment'' ''may be misleading''.

In its opinion the Court first substitutes ''jurisdiction of an issue of law or fact presented'' for ''power or authority to render the particular judgment''. It then quotes 1 Freeman on Judgments (5th Ed.), Vol. 1, pp. 444, 445, and says the phrase ''power or authority to render the particular judgment'' ''may be misleading'', but is clarified by the decision in Gile *vs.* Wood, 32 Ida. 752, 188 Pac. 36, to the effect that it is necessary
269 to the validity of the judgment that the Court

> ''have jurisdiction of the question which its judgment assumes to decide, *or of the particular remedy or relief which it assumes to grant.*''

Then the opinion refers to ''judicable inquiry'' and ''color of legal right'' and states that the undertaking cannot be examined to determine its legal effect and reaches a conclusion exactly opposite to that in Gile *vs.* Wood, *supra.*

Let us first consider the Gile case. There Wood,
270 a subordinate lienholder, was made defendant in a mortgage foreclosure under the general allegation that he claimed an interest, but no deficiency judgment against him was prayed for in the complaint. All the defendants had defaulted. The Court entered a personal judgment against Wood, the property was sold and a deficiency entered. Wood might have appealed because the judgment was erroneous as well as void, but he called the error to the attention of the District Court by motion to vacate; that Court vacated the personal judgment against him and plaintiff ap-

pealed. The lower court and this Court both held the judgment void in this regard. Why? Not because the plaintiff's attorney did not ask for it when he prepared the decree including that provision. No, it was vacated because the Court, although having jurisdiction of the person and the general subject-matter of foreclosure of the mortgage, had no power to render that particular judgment against Wood. This Court now says its former decision did not depend upon the proper construction of any document, but we ask how could this Court have ascertained that there was no allegation or prayer in the complaint authorizing the Court to enter a personal judgment against Wood without reading and construing the complaint? In the Gile case this Court did not decline to examine the complaint to see whether it "challenged judicable inquiry" or "afforded color of legal right". We submit that the analogy between the two cases is perfect. In the Gile case this Court construed the complaint on which the judgment vacated was based and held the judgment void for lack of power to grant it. Here the Court declines to construe the undertaking, which was the sole basis for the judgment, to determine whether or not the contingency therein stipulated, upon which judgment might be entered, had occurred. In both cases it is obvious that counsel for plaintiffs prepared the judgment and the lower court signed it as prepared. In neither case was there any issue of law or fact presented. In neither case was there any legitimate question presented to the Court for determination.

271 272 273

In its opinion herein, the Court frequently refers to plaintiff's motion for judgment. The rec-

274 ord shows neither written motion nor a minute entry of an oral motion, the judgment merely reciting "and the plaintiffs having moved for judgment". If an oral motion was made, which does not affirmatively appear from the record, it could not present an issue of law or fact because the hearing was *ex parte* and your petitioner had no opportunity to controvert plaintiff's claim. What is an issue and when does it arise? In Harris *vs.* San Francisco Co., 41 Calif. 393, at page 404, the Court makes this statement:

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> "An issue arises when a fact or conclusion of law is maintained by one party and controverted by the other in the pleadings."

Many similar definitions are found in 4 Words and Phrases, pages 3792-3, dating from Sir Matthew Hale and Blackstone. How could plaintiff by asking for judgment on the undertaking present an issue of law and how can this Court say that appellant's motion—if there was one—presented a legitimate question for determination without construing the undertaking? We there-

276 fore think it necessarily follows that if the decision in the present case is to stand, Gile *vs.* Wood must be overruled, and the same is true of a number of other decisions of this Court which, until the filing of the present opinion, were universally recognized as establishing the practice in such cases. The importance of the question to the lawyers and courts of the State compels a reference to these cases.

The other decisions cited by this Court on the question of jurisdiction, except for the case of

U. S. Nat. Bank *vs.* Eldredge, 49 Ida. 363, merely state the general requirements of jurisdiction of the person and jurisdiction of the subject-matter. The first case involving the power to render the particular judgment which we have found in Glover *vs.* Brown, 32 Ida. 426, 184 Pac. 649, in which the validity of a decree of distribution in the Probate Court was attacked by a suit in equity. Mr. Justice Budge, in giving the opinion of the Court, at page 436, says:

> "The principle, briefly summarized, may be 278
> stated thus: Even though a court has jurisdiction over the subject matter and the parties, *if it proceeds to dispose of matters over which it is not authorized to act or to grant relief of a character which it has no power to grant*, its judgment is in this respect void (Anthony *vs.* Kasey, 83 Va. 338, 5 Am. St. 277, at 278, 5 S. E. 176; Furman *v.* Furman, 153 N. Y. 309, 60 Am. St. 629, and note at pp. 643, 644, 147 N. E. 577; Day *v.* Micou, 18 Wall. 156, 21 L. ed. 861; *Ex Parte* Lange, 18 Wall. 163, 21 L. ed. 872, see, also, Rose's U. S. Notes; *In re* Klumpke's Estate, 167 Cal. 415, 139 Pac. 1062; Freeman on Judgments, 279
> sec. 116, p. 176.)" (Our italics.)

Chief Justice Morgan, concurring specially, laid down the rule in substantially the same language that he later used in Gile *vs.* Wood, *supra*, quoted in our printed brief at pages 48-49, and already discussed.

Wright *vs.* Atwood, 33 Ida. 455, 195 Pac. 195, was a collateral attack on the decree in a participation suit in the district court based on issues framed by the parties and which in the collateral

proceeding was claimed to be void because contrary to law. The opinion in which all five Justices of this Court concurred held the judgment was void for want of power to enter it. The Court says at page 461:

> "Judgments may be entered in cases where the court has undoubted jurisdiction over the subject matter, and of the parties, yet nevertheless may be void because the court decided some question which it had no power to decide, or granted some relief which it had no power to grant. *If a court grants relief which under no circumstances it has any authority to grant, its judgment is to that extent void, although it may have had jurisdiction over the subject matter and the parties.* (Freeman on Judgments, 4th ed., sec. 120c, p. 196; Gile *v.* Wood, 32 Ida. 752, 188 Pac. 36; Bridges *v.* Clay Co. Supervisors, 57 Miss. 252; Seamster *v.* Blackstock, 83 Va. 232, 5 Am. St. 262, 2 S. E. 36; Anthony *v.* Kasey, 83 Va. 338, 5 Am. St. 277, 5 S. E. 176; Wade *v.* Hancock, 76 Va. 620; Fithian *v.* Monks, 43 Mo. 502.)" (Our italics.)

The Court then makes the extremely forcible statement on limited jurisdiction in statutory proceedings quoted at the opening of this brief and continues at page 462:

> "The extent and nature of a power depend upon the terms in which it is conferred, and it will not be enlarged because exercised by courts clothed with general jurisdiction; *and a judgment by a tribunal without authority, or which exceeds or lies beyond its authority, is necessarily void,* and may be shown to be so in collateral proceedings, even though it

be a court of general jurisdiction, because no authority derived from the law can transcend the source from whence it came; and the principle that a limited authority must appear to have been strictly construed, even when the acts of a superior court are in question, is well settled. (Richardson *v.* Seever's Admr., 84 Va. 259, 4 S. E. 712; Eaton *v.* Badger, 33 N. H. 228; Ransom *v.* Williams, 2 Wall. 313, 17 L. ed. 803; The Mary, 9 Cranch. 126, 3 L. ed. 678, see, also, Rose's U. S. Notes.)" (Our italics.)

284 In Miller *vs.* Prout, 33 Ida. 709, 197 Pac. 1023, the situation was generally similar to that in Gile *vs.* Wood, *supra*, and the same rule was followed.

In Blackaby *vs.* Dunning, 40 Ida. 20, 232 Pac. 566, the Court says:

> "It is elementary that observance or fulfillment of the requirements of due process are necessary to the validity of a judgment."

Why? Not because they are necessary to give "color of legal right", but because without them the Court has no power to render a judgment.

285 In Maloney *vs.* Zipf, 41 Ida. 30, 237 Pac. 632, cited by this Court in its opinion to sustain its conclusion, the Court, at page 33, says:

> "The words stricken from the judgment 'and that all acts and proceedings of defendant as executrix of said Will be, and the same are hereby annulled and set aside' was the entry of an order beyond what the court was authorized to make in that proceeding. It is necessary to the validity of a judgment that the court have jurisdiction of the question which it assumes to decide, or the particular

remedy or relief which it assumes to grant, *and when any portion of a judgment or decree is void on its face, because of going beyond what the court was authorized to decide, it may strike therefrom the void portion.* (Gile *v.* Wood, 32 Ida. 752, 188 Pac. 36; Miller *v.* Prout, 33 Ida. 709, 197 Pac. 1023; Wright *v.* Atwood, 33 Ida. 455, 195 Pac. 195.)" (Our italics.)

The following authorities quoted in respondents' printed brief to sustain the same proposition
287 are expressly approved in several of the above cases:

Freeman on Judgments (pp. 48 and 58);
Sharp *vs.* Sharp, 166 Pac. 175 (p. 49);
Standard Savings & Loan Ass'n *vs.* St. Anthony Co., 162 Pac. 451 (p. 50);
Sache *vs.* Gillette, 11 L. R. A. (N. S.), 803 (pp. 53-4);
Reynolds *vs.* Stockton, 140 U. S. 254, 40 L. Ed. 465 (p. 56).

In *Ex Parte* Lange, 18 Wall. 163, 21 L. Ed. 872,
288 cited by this Court in Glover *vs.* Brown, *supra,* the Court makes some very pertinent observations, saying at pages 878-9 of the Lawyers Edition Report:

"But it has been said that, conceding all this, the judgment under which the prisoner is now held is erroneous, but not void; and as this court cannot review that judgment for error, it can discharge the prisoner only when it is void.

But we do not concede the major premise in this argument. A judgment may be erro-

neous and not void, and it may be erroneous because it is void. The distinctions between void and merely voidable judgments are very nice, and they may fall under the one class or the other as they are regarded for different purposes. * * *

Unless the whole doctrine of our system of jurisprudence, both of the Constitution and the common law, for the protection of personal rights in that regard, are a nullity, the authority of the court to punish the prisoner was gone. The power was exhausted; its further exercise was prohibited. It was 290
error, but it was error because the power to render any further judgment did not exist.

It is no answer to this to say that the court had jurisdiction of the person of the prisoner, and of the offense under the statute. It by no means follows that these two facts make valid, however erroneous it may be, any judgment the court may render in such case. If a justice of the peace, having jurisdiction to fine for a misdemeanor, and with the party charged properly before him, should render a judgment that he be hung, it would simply be void. Why void? *Because he had no power to render such a judgment.* So, if a court of general jurisdiction should, on an indictment 291
for libel, render a judgment of death, or confiscation of property, it would, for the same reason, be void. Or if, on an indictment for treason, the court should render a judgment of attaint, whereby the heirs of the criminal could not inherit his property, which should, by the judgment of the court be confiscated to the State, it would be void as to the attainder, because in excess of the authority of the court, and forbidden by the Constitution.'' (Our italics.)

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After pointing out that the same rule has been followed by that Court in the civil cases of *Bigelow* vs. *Forrest*, 9 Wall. 339, 19 L. Ed. 696, and *Day* vs. *Micou*, 18 Wall. 156, 21 L. Ed. 860, the Court continues at page 879:

> "But why could it not? Not because it wanted jurisdiction of the property or of the offense, or to render a judgment of confiscation, but because in the very act of rendering a judgment of confiscation it condemned more than it had authority to condemn. *In other*
293 *words, in a case where it had full jurisdiction to render one kind of judgment, operative upon the same property, it rendered one which included that which it had a right to render and something more, and this excess was held simply void.* * * *
>
> There is no more sacred duty of a court than, in a case properly before it, to maintain unimpaired those securities for the personal rights of the individual which have received for ages the sanction of the jurist and the statesman; and in such cases no narrow or illiberal construction should be given to the words of the fundamental law in which they are embodied." (Our italics.)

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This case demonstrates that in the opinion of the Supreme Court of the United States due process of law and equal protection of the laws require that in order to sustain the validity of a judgment, the Court must have power and authority to render the particular judgment it does render and that failure to recognize this limitation is a violation of the Fourteenth Amendment to the United States Constitution. Other authorities sustaining the general proposition as announced

by this Court in *Wright* vs. *Atwood, supra,* and other cases are:

*Crew* vs. *Pratt,* 119 Calif. 139, 51 Pac. 38 (Respondent's Brief, pp. 58-9);
*Morawetz* vs. *Sun Ins. Office,* 96 Wis. 175, 65 Am. St. Rep. 43;
*Knickerbocker Trust Co.* vs. *Oneonta Ry. Co.* (N. Y.) 94 N. E. 871.

The above cases and the authorities generally on the question of jurisdiction will be searched in 296
vain for any statement to the effect that the validity of a judgment depends upon a question which challenges "judicable inquiry" or affords "color of legal right". We have cited authorities from other jurisdictions to show that the considered decisions of this Court above referred to are right and sound, but independently of that they have definitely established rules of practice in this State which should not be lightly overturned and should clearly be followed under the doctrine of *stare decisis.* Further, even if this Court wishes to overrule its six previous decisions cited above, let 297
it do so expressly and not confuse the practice in this State further by saying that the rule adopted in those cases "may be misleading".

Let us consider for a moment the case of *U. S. National Bank* vs. *Eldredge,* 49 Ida. 363, 288 Pac. 416, in which so far as we have been able to ascertain the phrase "judicable inquiry" was used for the first time in legal history. We do not believe that the question whether or not a judgment rendered upon a complaint which does not state a cause of action is both void and erroneous, or merely erroneous, is greatly material in the pres-

298 ent case, but we do wish to direct the Court's attention to the fact that the decision rests apparently upon a misconception of the record in *Jensen* vs. *Gooch*, 36 Ida. 457, 211 Pac. 551, which it purports to distinguish, and the two decisions are squarely and unavoidably in conflict. In its opinion in the Eldredge case the Court, referring to the Jensen case, says:

> "The second syllabus * * * is misleading, for in that case the decision holds the district
299 court had jurisdiction to act, but as a matter of fact acted erroneously."

The record in Jensen *vs.* Gooch, *supra*, discloses that the appeal was from an order denying a motion to vacate judgment and there was no appeal from the judgment. Judgment was entered October 22, 1919; motion to vacate, July 14, 1920; order denying motion, October 26, 1920, and appeal was taken from the latter order on December 1, 1920—over a year after the entry of the original judgment. The only way in which the complaint in the action could be before this Court
300 was for the purpose of construction to determine whether or not it stated a cause of action and therefore rendered the judgment void. This Court holds expressly that the judgment was void, saying:

> "But in the face of the record the judgment is void because the complaint fails to state facts sufficient to constitute a cause of action against appellant."

It was therefore error in the opinion of this Court to refuse to set aside the judgment because

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this Court found upon a construction of the complaint that it did not state a cause of action and therefore the Court was without power to give the judgment rendered. In the closing paragraph of its opinion the Court says that the lower court had erred in overruling the demurrer and the case was remanded with leave to plaintiff to amend and apparently in U. S. National Bank *vs.* Eldredge, *supra,* this Court assumed from that statement that there was also an appeal from the judgment in the former case. The purpose of this statement in the Jensen case was apparently 302
to avoid any misunderstanding of the effect of its ruling by the lower court, but it would seem that the result was to create a misunderstanding in this Court some years later as to just what had been before it in the former case. As already stated, we do not think the inherent soundness of either of these decisions is greatly material in the present case, but we do wish to emphasize that they are hopelessly in conflict and both cannot be the law of this State.

We think it clear from the above authorities that power and authority to render the particular 303
judgment awarded was essential to its validity. It therefore follows that this Court could not hold the judgment valid, as it was entered in a special statutory proceeding in which no presumptions as to jurisdiction could be entertained, without examining the record and construing the undertaking on which the judgment was based to ascertain whether the lower court had power to enter the judgment which it did enter on June 23, 1930. To make this determination, the Court must at least examine, consider and construe the judg-

ment originally appealed from, the undertaking itself, the remittitur from this Court, the District Court judgment entered pursuant to such remittitur by a Judge other than the Judge who entered the judgment against the surety, as well as the judgment in question. If these documents when properly considered and construed and given their fair legal effect, fail to show affirmatively that the District Court had jurisdiction of the person of American Surety Company of New York on June 23, 1930, or fail to show that it had
305 power and jurisdiction to enter the particular judgment which it did enter, then said judgment was void and was properly vacated on respondent's motion.

We will not take the time to again analyze and construe the provisions of the undertaking which are discussed at length at pages 15-46 of respondent's printed brief. It would seem, however, from the majority opinion in this cause, that we failed to make our position clear to the Court as to the effect of the recitals in the introductory part of the bond. We discussed these recitals at pages
306 35-38 of the brief and then stated that while recitals could be considered in case of doubt, the language in the undertaking itself was so clear in its limitation to the Singer Sewing Machine Company alone that any quibbling on that point seemed unnecessary. We then quoted the language of the obligatory part of the undertaking and, as pointed out by Mr. Justice Budge in his dissenting opinion in the present case, that language affirmatively shows that the undertaking was given solely for the purpose of staying exe-

cution against Singer Sewing Machine Company and the Surety Company's liability could arise only in the event the judgment should be affirmed in whole or in part as against Singer Sewing Machine Company.

For these reasons we submit that this Court erred in holding that it could not construe the undertaking and also erred in not holding, after a construction of the record, that the judgment was void for lack of jurisdiction of the person and lack of power to enter the judgment. 308

**The Judgment Was Not Appealable and Motion to Vacate Was Proper Remedy.**

Throughout its opinion this Court assumes that your petitioner had a remedy by appeal from the judgment of June 23, 1930, and misconceived its remedy by moving to vacate the judgment. This is the first time, so far as we have been able to ascertain by a diligent search of the authorities, in which it has even been intimated by this Court that such a right of appeal existed and we are sure there is no decision to that effect. On the 309 other hand, the authorities establish clearly that *ex parte* judgments, summary judgments and consent judgments are not appealable and the judgment in question comes under each of these headings.

3 Corpus Juris, page 608, states:

> "Although it is sometimes otherwise under a statute, the general rule is that no appeal lies from an *ex parte* judgment or order, the proper remedy being to apply to the court to have such judgment or order set aside and

310 then, if the application is denied, to take an appeal from the denial."

In Wilson *vs.* Martin (Wn.), 86 Pac. 205, an appeal from an *ex parte* order, the Court says:

"The rule seems to be well established that an appeal will not lie from an *ex parte* order. The proper procedure is to move to vacate or set aside the order and appeal from the decision on the motion. 2 Ency. of Pl. & Pr., p. 96; 2 Cyc. 621, and cases cited. To the same
311 effect see Pacific Supply Co. *v.* Brand, 7 Wash. 357, 35 Pac. 72; Hall *v.* Skavdale, 21 Wash. 203, 57 Pac. 807."

In State *ex rel.* Norris *vs.* District Court (Minn.), 53 N. W. 1157, an appeal from an *ex parte* order, the Court says:

"That appeals will lie from such *ex parte* orders is opposed to the obvious reason upon which all purely appellate proceedings must be supposed to rest, namely, the necessity of an appeal to correct the error supposed to have been committed. The law attaches much
312 importance to the hearing of both the interested parties, not only as a matter of right to them, but as an aid to courts in the determination of matters brought before them. It is ordinarily to be supposed that a court which may have acted inconsiderately or erroneously upon a one-sided application would perceive and correct its error if the adverse party were heard. An examination of many decisions in this court shows that the general language of the statute declaring the right of appeal has been construed in a limited sense where there has been no real consideration in the court below of the matter in ques-

tion, with opportunity for the interested parties to be heard, and when it is to be presumed that upon hearing and consideration the court would correct any error which it may have committed."

In 3 C. J., 609, it is said:

"The general rule is that decisions on motions or summary applications cannot be thrown into the shape of records, and becomes the subject of revision in any other court by appeal or writ of error."

314

The authorities cited sustain this statement and a moment's reflection will indicate this rule must necessarily be applied to summary judgments on supersedeas undertakings. One of the conditions specified in the statute and required to be set forth in the undertaking is that the appellant shall not have paid the judgment within 30 days. Such payment would not normally be of record in the lower court. Suppose the judgment was in fact paid and the plaintiff nevertheless asked for judgment without notice. The surety in such a situation would have no opportunity to show payment and it would have no possible error to assign in this Court as ground for reversal. In Meredith *vs.* Santa Clara Mining Ass'n, 60 Calif. 617, the Court suggested that in such an event the sureties might have the judgment vacated or annulled and the present situation where the surety contends that the judgment was entered upon a condition not specified in the bond is quite similar.

315

On the question of consent judgments, the authorities are universal that they are not appealable if judgment is in accordance with the consent

316 *Petition for Rehearing.*

and the authorities cited in the Court's opinion herein on the necessity of notice, and at the opening of this brief abundantly demonstrate that the judgment against a surety on a supersedeas undertaking is a consent judgment.

The rule as to appeals from consent judgments is thus stated in 3 C. J., 671-2:

> "It is a well settled general rule, declared in some states by express statutory provision, that a party cannot complain of a judgment, order, decree, or ruling rendered or made, on
317 agreement or otherwise, with his express or implied consent, or appeal or sue out a writ of error to review the same, even though there has been an attempt to reserve the right to appeal."

Authorities to support this rule are cited from some 35 different states and the same rule was impliedly adhered to by this Court over thirty years ago in the case of Strode *vs.* Miller, 7 Ida. 16, 59 Pac. 893. At page 19 it is said:

> "It is contended by the respondent, however, that, the judgment being a consent
318 judgment, the appellants are estopped from complaining of it, and the appeal should be dismissed."

At page 20 the Court says:

> "The judgment not being warranted by the stipulation, the appellants are not estopped from appealing therefrom. We feel sure that the judgment in this case was entered through inadvertence. Appellants should have made application to the district court to vacate said judgment under section 4229 of the Revised

Statutes. Such application, we are satisfied, would have obviated the necessity of this appeal."

As already point— out, there seems to be neither a decision nor an expression of opinion from this Court upon the precise question, but the Supreme Court of California upon the identical statute, after some uncertainty in the earlier decisions, has definitely established the rule that an appeal will not lie. In the case of Duerr *vs.* Sloan (Calif.) 195 Pac. 475, at page 477, it is said:

"The appeal of the sureties from the judgment must be dismissed. By the stipulation which they made in the appeal bond they consented that judgment might be entered against them without notice if the defendant and appellant in the main suit failed to pay within 30 days after the filing of the remittitur in the superior court. Thus, at the expiration of 30 days from the date of the filing of the remittitur, the plaintiff in the main suit was entitled to the entry of judgment against the sureties, without notice to them, upon presentation of the record in the case showing that said judgment had not been paid within the time stipulated. Having consented to the entry of such judgment, the sureties cannot be heard in an appeal therefrom. Erlanger *v.* S. P. R. R. Co., 109 Cal. 395, 42 Pac. 31; Mecham *v.* McKay, 37 Cal. 154, 158; Judnick *v.* Judnick, 190 Pac. 480. Nothing herein is inconsistent with Hawley *v.* Gray, 127 Cal. 560, 60 Pac. 437. Where, as in that case, a judgment is entered prior to the expiration of the 30-day period, it is not a 'consent' judgment; that is to say, the judgment is not in accord with the consent given."

322 In addition to the cases cited in the above quotation, the following later decisions have applied the same rule, citing the earlier cases:

Hotchkiss *vs.* Superior Court (Calif.), 269 Pac. 524;
Roberts *vs.* Fitzgerald (Calif.), 271 Pac. 1110;
People *vs.* Aymer (Calif.), 276 Pac. 595, 596.

323 In the face of these authorities, how can it be said that your Petitioner had a right to appeal from the judgment of June 23, 1930? What record could it make on such an appeal, and what error could it assign? The only contingency upon which an appeal would lie would be that the judgment was not in accordance with the consent of the surety. In that event the judgment would not only be erroneous, but wholly void for lack of jurisdiction of person of the surety and lack of power to render the particular judgment against it, and admittedly could be vacated on motion. This procedure is eminently proper because it
324 calls the claimed error to the attention of the trial court and affords it an opportunity to correct the mistake. Further, it gives the surety a chance to make its record and being a special order after judgment made on notice and hearing, either party aggrieved thereby may appeal and have his rights finally determined. This procedure has the approval of this Court in the case of Strode *vs.* Miller, 7 Ida. 16, 59 Pac. 893, already cited. There a judgment had been entered by stipulation. Appellant contended that some of the terms of the

judgment were contrary to the stipulation and appealed. This Court held the judgment appealable because not warranted by the stipulation and then suggests the proper practice in the following language at page 20:

> "We feel sure that the judgment in this case was entered through inadvertence. Appellants should have made application to the district court to vacate said judgment under section 4229 of the Revised Statutes. Such application, we are satisfied, would have obviated the necessity of this appeal." 326

On principle, that case is exactly on all-fours with the case at bar. There the district court entered judgment upon stipulation. Here it entered judgment of the assumed consent of Petitioner in its undertaking. There this Court held the judgment void because it exceeded the terms of the stipulation and stated that application to vacate should have been made to the trial court. Here application to vacate was made to the trial court in accordance with the practice established since 1900 because the judgment exceeded the consent given by your petitioner in its undertaking, 327 and the trial court vacated the judgment on that ground. But on the judgment creditor's appeal in the present case, we now find this Court reversing the rule of practice suggested in Miller *vs.* Strode and denying your Petitioner the right to have its consent construed because Petitioner followed the procedure that the Supreme Court suggested in the former case. In that case this Court did not deny relief because it thought the procedure by motion preferable. It granted the re-

lief and gave its suggestions as to the proper practice. In the present case the substance of the Court's holding is that if the application of plaintiffs for judgment challenged "judicable inquiry" or "afforded color of legal right", your Petitioner should have appealed from the judgment, while otherwise the judgment would be void and the surety could only attack it by motion to vacate. This leaves a surety in such cases in the position where it must select the proper procedure at its peril, forcing it to take both horns of the dilemma
329 and adding to the bewilderment and confusion created by the use of such general and indefinable terms as "judicable inquiry" and "color of legal right". We earnestly urge, therefore, that the procedure suggested by this Court in Strode *vs.* Miller should be adhered to in order that litigants may not be deprived of their substantial rights because this Court may change its views upon mere technical details of procedure.

In connection with this matter of procedure, we also submit that the contentions elaborated at length in the printed briefs of appellants to the
330 effect that judgments can only be vacated when absolutely void or under a procedure authorized by express statute, rest upon the constitutional and statutory provisions in California by which terms of court are abolished, and is not even applied in that jurisdiction where the judgment is void in fact but not void on the face of the record, nor where there has been some inadvertence or irregularity in entering the judgment or a violation of stipulation, agreement or consent.

In 14 Calif. Juris., p. 1009, it is pointed out that under the common law and in California before the constitutional and code changes abolishing terms of court, a court of general jurisdiction had complete control of its entire proceedings during the term and might change, modify, amend or strike out from its judgments as it deemed necessary and proper during the term, even after the entry of final judgment. The early law on this point is discussed at length by the court in Wiggin *vs.* Superior Court, 68 Calif. 298, 9 Pac. 646. 332
It is obvious that in this State where terms of court are requested by both the Constitution and the Statute, the common law rule applies.

In 14 Calif. Juris., p. 1019, the contention made by appellants is disposed of thus:

> "It has been said that aside from the power granted by this Section of the Code (corresponding to our Section 6726), a judgment may be vacated on motion only when it is void on its face. But this is not true, as it is settled that a lack of jurisdiction may be shown on motion though the judgment is regular on its face. * * * " 333

At pages 1019-20 it is stated:

> "Independent of statutory provisions the court has power to correct mistakes in its proceedings, and to annul within a reasonable time, orders and judgments inadvertently made. Where the judgment of a court has been deliberately exercised in a cause and a final result reached as a conclusion thereof, there are good reasons why it should not be disturbed except by the formal methods prescribed by statute; but rulings, orders and

> even judgments, inadvertently made, are not the result of judgment but of oversight, neglect, or accident and are subject to correction by the judge or court making them."

It is thus clear that regardless of whether or not absence of "judicable inquiry" or "color of legal right" rendered the judgment strictly void, the trial court on the motion of your petitioner, made 3 days after the entry of judgment and prior to the expiration of the term of court, had
335 full power to vacate that judgment entered without notice or hearing and purely *ex parte*, provided it found the consent given in the surety's undertaking did not justify such judgment.

**Denial of Constitutional Rights.**

The effect of the opinion in this case is to deprive your petitioner of its property without due process of law and to deny to it the equal protection of the laws, contrary to the Fourteenth Amendment to the Constitution of the United
336 States. Jurisdiction of the person of a defendant and power to render the particular judgment awarded are essential elements of due process. The only theory upon which the summary judgment authorized by Section 7155 C. S. can be justified is that a judgment entered in accordance therewith is based on the consent of the surety as evidenced by its undertaking. If the judgment is in accordance with that consent, no appeal will lie. If, on the other hand, as contended by your petitioner, the judgment is not within the consent

or in accordance with the nature of its undertaking, the trial court had neither jurisdiction of the person nor power to enter judgment against it and yet this Court denies your Petitioner the right to make a direct attack upon such judgment by motion to vacate, which is the recognized mode of procedure in attacking void judgments, and a procedure that has been repeatedly sanctioned and approved by this Court and upon which your petitioner had a right to rely.

338

**Judgment Contrary to Equity and Good Conscience.**

One of the grounds of your petitioner's motion to vacate the judgment was that it was contrary to equity and good conscience and in closing the argument on this petition we feel justified in urging upon this Court that it has a right to consider the equities in this case and that to permit the judgment entered in the lower court against the American Surety Company of New York to stand and to be enforced, is contrary to good conscience 339
and equity. We feel justified in urging this upon the Court in view of our statute, Sec. 6591, C. S., which provides that all distinctions between suits in equity and actions at law are abolished and furthermore provides that in all matters not regulated by the code wherever there is a variance between the rules of equity and the rules of law that the rules of equity shall prevail, and under Section 9444, C. S. If, as a matter of fact, an examination of the undertaking in question, and

340 applying thereto the legal principles of construction, show clearly and beyond question that it was given to stay execution against the Singer Sewing Machine Company alone and that its only object and undertaking was to pay any judgment, damages or costs awarded against the Singer Sewing Machine Company, then to force it to pay the judgment affirmed against defendant Ed Anderson, who is a stranger to its obligation and for whom it never assumed any liability, is such a
341 gross miscarriage of justice as will shock the judicial conscience. If, after such full consideration of the undertaking in question, this Court can fairly say that it is properly interpreted to include the payment of any judgment affirmed against the defendant Ed Anderson, we have nothing more to say. If, however, on the other hand, as we earnestly urge is true, such examination will show that it did not obligate itself to pay anything by reason of the affirmance of the judgment against Ed Anderson, then we urge the Court in good conscience and equity that it cannot permit
342 its decision as now written to stand. We cannot believe that a court is ever called upon to sacrifice justice to form or to permit a technicality in procedure to deprive an individual of his rights and property, when justice and equity is shocked by the result. We urge that this view should appeal to the Court with great force in view of the provisions of Section 9444, C. S., establishing the rule for the construction of the Compiled Statutes, to-wit:

> "The compiled laws establish the law of this state respecting the subjects to which

they relate, and their provisions and all proceedings under them are to be liberally construed with a view to effect their objects and to promote justice."

It will be noted that the Legislature in fixing this rule for the construction of statutes not only provided that the provisions of the statutes are to be liberally construed "to promote justice", but that all proceedings under these statutes shall be liberally construed "to promote justice".

This instruction of the Legislature that the statutes and the proceedings thereunder shall be liberally construed "to promote justice" is given greater force in this particular case when we consider that the district court, in acting under the provisions of C. S., Sec. 7155, and entering judgment against the respondent *ex parte* and without notice, was acting, not under its general jurisdiction conferred by the Constitution and after notice to the respondent and giving it a chance to be heard as in a regular proceeding, but was acting in a special proceeding provided by the statute without notice and without giving the respondent a chance to be heard and that its jurisdiction in so acting was limited and special, and that any jurisdiction that it might have had over the respondent and any jurisdictional power it had to enter judgment must be found in the terms of respondent's obligation in the undertaking in question and the consent which the respondent gave therein. 344 345

Finally, we urge that only justice can be done by the Court giving the record in this case full consideration and giving a legal construction of the undertaking in question. If the Court by such

proceeding finds that the American Surety Company undertook to pay any part of the judgment affirmed against the defendant Ed Anderson, well and good. If the Court finds that it did not undertake to pay the judgment or any part thereof if affirmed against defendant Ed Anderson, and affirms the order vacating judgment, then justice has been done and the plaintiffs and appellants have received no injury.

For these reasons, we respectfully submit that the Court should grant a rehearing in the above case.

Respectfully submitted,

RICHARDS & HAGA,
MARTIN & MARTIN,
Residence: Boise, Idaho,
Attorneys for Petitioner.

Service of the above and foregoing Petition for Rehearing and receipt of a copy thereof is hereby admitted this 22nd day of May, 1931.

JAMES F. AILSHIE, JR.
J. R. SMEAD
Residence: Boise, Idaho
Attorneys for Appellants

BOISE, IDAHO, June 3, 1931.

Court met pursuant to adjournment.

Present: Associate Justices BUDGE, GIVENS, VARIAN and MCNAUGHTON.

The following proceedings were had:

VIVIAN F. BALDWIN *et al.*, Appellants, 350

*v.* No. 5653

ED. ANDERSON *et al.*, Respondents.

In this cause counsel for respondents having heretofore filed petition for rehearing, and the Court having fully considered the same, on this day it was ordered that said petition for rehearing be and the same is hereby denied. 351

352

## Clerk's Certificate.

I, CLAY KOELSCH, Clerk of the Supreme Court of the State of Idaho, do hereby certify that the foregoing printed pages numbered from 1 to 117, inclusive, constitute a true and complete transcript of the record and proceedings had in said Court in the case of Vivian F. Baldwin and E. R. Baldwin, Appellants and Ed. Anderson and American Surety Company of New York, Respondents, number 5653, as the same remain of record and on file in the Supreme Court of Idaho.

353

IN TESTIMONY WHEREOF I have hereunto subscribed my name and the seal of said Supreme Court of Idaho at Boise, Idaho, this day of September, 1931.

(SEAL)

CLAY KOELSCH
Clerk of the Supreme Court of
the State of Idaho.

354

SUPREME COURT OF THE UNITED STATES

ORDER EXTENDING TIME—Filed Aug. 29, 1931

On application of the American Surety Company of New York by William Marshall Bullitt, its Counsel, it is ordered that the time within which it may file its petition for a Writ of Certiorari to review a judgment of the Supreme Court of Idaho in the case of Vivian F. Baldwin and E. R. Baldwin, Appellants and Ed Anderson and American Surety Company of New York, Appellees, No. 5653, wherein the opinion was filed by the Supreme Court of Idaho on May 2, 1931, and the petition for rehearing was denied June 2, 1931, be and the same hereby is extended for the period of sixty days from and after September 1, 1931.

Dated August 27, 1931, Chatham, Mass.

Louis D. Brandeis, Associate Justice of the Supreme Court of the United States.

[File endorsement omitted.]

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SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 25, 1932

The petition herein for a writ of certiorari to the Supreme Court of the State of Idaho is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1932

## No. 21

VIVIAN F. BALDWIN AND E. B. BALDWIN,
PETITIONERS,

*vs.*

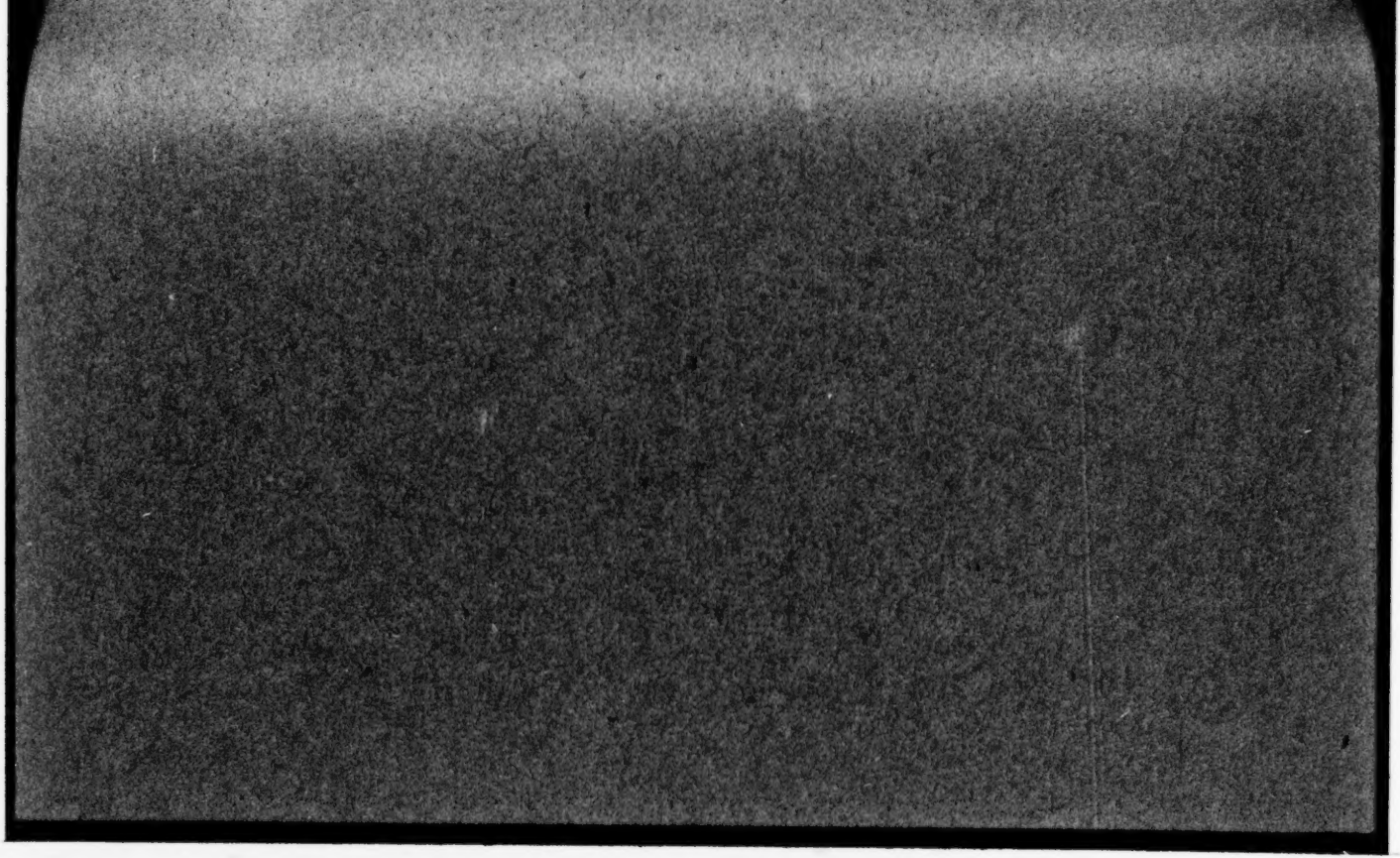
AMERICAN SURETY COMPANY OF NEW YORK

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 21, 1932

CERTIORARI GRANTED APRIL 25, 1932

(36,628)



# (36,628)

# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1932

# No. 21

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VIVIAN F. BALDWIN AND E. R. BALDWIN,
PETITIONERS,

*vs.*

AMERICAN SURETY COMPANY OF NEW YORK

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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[Endorsed]: U. S. District Court, District of Idaho. Filed Jul. 6, 1931. W. D. McReynolds, Clerk. By ————, Deputy.

In the District Court of the United States, for the District of Idaho, Southern Division.

IN EQUITY—No. 1626.

AMERICAN SURETY COMPANY OF NEW YORK, a Corporation,

Plaintiff,

vs.

VIVIAN F. BALDWIN and E. R. BALDWIN,

Defendants.

## BILL OF COMPLAINT.

To the Honorable CHARLES C. CAVANAH, Judge of the District Court of the United States, for the District of Idaho:

American Surety Company of New York, a corporation duly created and existing under the laws of the State of New York and a citizen of said State, brings this its bill of complaint against Vivian F. Baldwin and E. R. Baldwin, who are citizens of the State of Idaho, residing in Boise, Ada County, said State, and complains and says:

I.

That at all the times hereinafter mentioned the plaintiff, American Surety Company of New York, was, and now is, a corporation organized and existing under and by virtue of the laws of the State

of New York, and a citizen and inhabitant of the State of New York, having its principal office and place of business at No. 100 Broadway, City of New York, State of New York.

II.

That the defendants Vivian F. Baldwin and E. R. Baldwin now are, and at all the times hereinafter mentioned, were citizens of the State of Idaho, residing in Ada County, said State.

III.

That this is a suit of a civil nature and the matter in controversy exceeds, exclusive of interest and costs, the [1*] sum or value of $3,000.00.

IV.

That during all the times herein mentioned plaintiff was and still is a surety company engaged in the writing of surety bonds of all kinds and is and was authorized to carry on such surety business in the State of Idaho under and by virtue of a compliance with the laws thereof relating to surety companies, and as such Surety Company plaintiff was authorized and empowered to execute and become surety upon the bond or undertaking hereinafter referred to.

V.

That some time prior to the 31st day of May, 1928, the exact date being to this plaintiff unknown, the said Vivian F. Baldwin and E. R. Baldwin commenced an action in the Dis-

*Page-number appearing at the foot of page of original certified Transcript of Record.

trict Court of the Third Judicial District of the State of Idaho, in and for Ada County, against one Ed Anderson and the Singer Sewing Machine Company, a corporation, to recover damages for injuries alleged to have been sustained by the said Vivian F. Baldwin due to the alleged carelessness and negligence of the said Ed Anderson, an employee of said Singer Sewing Machine Company; that such proceedings were had in said cause; that on or about the 31st day of May, 1928, the said Vivian F. Baldwin and E. R. Baldwin recovered a judgment in said court against the said Ed Anderson and against the said Singer Sewing Machine Company, in the sum of $19,500.00 and costs of suit.

VI.

That thereafter and on or about the 27th day of August, 1928, the said Ed Anderson and the said Singer Sewing Machine Company, by and through their respective attorneys, appealed from said judgment so entered against them as aforesaid to the Supreme Court of the State of Idaho; that the said Ed Anderson gave an undertaking for costs only on said appeal [2] as provided in Section 7154 of the Compiled Statutes of Idaho, 1919, but the said Singer Sewing Machine Company, being desirous of staying all proceedings against it on said judgment pending the determination of said appeal, applied to the plaintiff to execute a supersedeas bond or undertaking on said appeal, in the sum of $25,000.00, on behalf of said Singer Sewing Machine Company but not on be-

half of the said Ed Anderson, in accordance with the provisions of Section 7155 of the Compiled Statutes of Idaho, 1919. That in accordance with the request of said Singer Sewing Machine Company, plaintiff executed said undertaking and attached hereto, marked Exhibit "A," is a true and correct copy of said undertaking, and plaintiff prays that the same may be referred to with the same force and effect as if the same were herein set forth at large, and said Singer Sewing Machine Company thereupon filed said undertaking in said cause. That said undertaking was executed solely for the benefit of said Singer Sewing Machine Company and for the sole purpose of staying all proceedings against said Singer Sewing Machine Company on said judgment pending said appeal and the same was not executed at the instance or for the benefit of the said Ed Anderson and said undertaking was not intended to and did not stay execution of said judgment against said Ed Anderson pending the determination of said appeal by the Supreme Court of the State of Idaho.

VII.

That thereafter such proceedings were had on said appeal that on or about the 10th day of April, 1930, the Supreme Court of the State of Idaho rendered its decision in said cause on said appeal, which said decision is reported in Volume 49, Idaho Reports on pages 231 to 239, inclusive; and thereafter and on or about the 22d day of May, 1930, the remittitur from the Supreme Court of the State of Idaho was filed in the [3] *the* District Court

of the Third Judicial District of the State of Idaho, in and for Ada County, the material part or portion of which is as follows, to wit:

> "That the judgment of the District Court of the Third Judicial District in and for Ada County be reversed as to appellant Singer Sewing Machine Company and affirmed as to appellant Anderson. Costs awarded to appellant Singer Sewing Machine Company in the sum of $488.35. Costs as against appellant Anderson to respondents, in the sum of $40.00."

VIII.

That thereafter and on or about the 24th day of May, 1930, the said District Court of the Third Judicial District of the State of Idaho, in and for Ada County, pursuant to said remittitur, made and entered a judgment in said cause dismissing said cause as to the defendant Singer Sewing Machine Company and awarding said Singer Sewing Machine Company judgment against said Vivian F. Baldwin and E. R. Baldwin for its costs on said appeal in the sum of $488.55, a true copy of which judgment is hereto attached, marked Exhibit "B," and plaintiff prays that it may refer thereto with the same force and effect as if the same were herein set forth at large. That by virtue of the filing of said remittitur and the entry of said judgment (Exhibit "B"), the said District Court lost all jurisdiction of the person of the said Singer Sewing Machine Company and of the person of plaintiff herein as surety on said undertaking on appeal (Exhibit "A").

IX.

That thereafter, to wit: On June 23, 1930, one of the attorneys of record for said Vivian F. Baldwin and E. R. Baldwin in said cause against said Ed Anderson and said Singer Sewing Machine Company, without notice to either said Singer Sewing Machine Company or this plaintiff and without their knowledge, represented to the Honorable Charles F. Koelsch, one of the Judges of the Third Judicial District of the State of Idaho, in and [4] for Ada County, that this plaintiff was also surety for said Ed Anderson on said undertaking (Exhibit "A"), and that judgment should be forthwith entered against this plaintiff for failure to pay the judgment (Exhibit "B") theretofore entered against said Ed Anderson, which representations were wrong, false and fraudulent and were a fraud upon said District Court and upon the Honorable Charles F. Koelsch, one of the Judges thereof, and said attorney for the defendants herein (plaintiffs in said action), at the time of making said representations, also presented to the Honorable Charles F. Koelsch a draft of a judgment against this plaintiff on said undertaking and requested that the same be signed as the judgment of said Court, and the Honorable Charles F. Koelsch thereupon and at Chambers but not in open court and without notice to either the said Singer Sewing Machine Company or this plaintiff and without their knowledge or consent, signed the draft of said judgment so presented to him as aforesaid and filed the same with the Clerk of said court. That attached hereto and marked

Exhibit "C" is a true and correct copy of the judgment so signed and filed as aforesaid, and plaintiff prays that it may refer thereto with the same force and effect as if said judgment were herein set forth at large. That while said judgment purports to state that the motion therefor was made in open court and that said judgment was signed and entered in open court, the said judgment was in truth and in fact, as plaintiff is informed and believes and so alleges the fact to be, made and signed at Chambers and not in open court and no written motion whatsoever was made or filed for the entry of said judgment and no motion was made in open court for the entry of said judgment; that the minutes of the Court made no reference whatsoever to said proceedings or to any application, motion or request by the attorney for said Vivian F. Baldwin and E. R. Baldwin for the entry of any judgment against this plaintiff on said undertaking [5] or that any judgment was or should be entered against this plaintiff as surety on said undertaking, or otherwise.

X.

That no notice whatsoever was given to this plaintiff or to its statutory agent for the service of process, or to any of its agents or representatives, of said application by the attorneys for said Vivian F. Baldwin and E. R. Baldwin for judgment against this plaintiff, and plaintiff did not learn that said judgment had been entered against it until on or about the 24th day of June, 1930, and plaintiff was prevented by the wrongful conduct of said

defendants and their attorneys from presenting its objections and defenses to the entry of said judgment before said judgment was so entered and filed. That said judgment is wholly void in that the said District Court had no jurisdiction of the person of this plaintiff when said judgment was entered and had no power to render said judgment against this plaintiff, and plaintiff was not and neither was said Singer Sewing Machine Company, the principal named in said undertaking, in default in any of the obligations assumed by said undertaking, and this plaintiff had not consented by the terms of said undertaking to the entry of judgment against it because of any default on the part of said Ed Anderson, but only in the event that the judgment appealed from should be affirmed in whole or in part as against the Singer Sewing Machine Company, the principal named in said undertaking, and when said Singer Sewing Machine Company was dismissed from said action as provided in Exhibit "B" hereto attached, this plaintiff as its surety on said appeal was likewise dismissed from said action and no judgment could thereafter be entered against this plaintiff under Section 7155, Compiled Statutes of Idaho, 1919, by consent or otherwise, or without service of process and without an opportunity to this plaintiff to be heard prior to the entry of said judgment [6] and to present its objections and defenses thereto; that the entry of said judgment (Exhibit "C") against this plaintiff denied to plaintiff the equal protection of the laws and due process of law as guaranteed by the

Fourteenth Amendment to the Constitution of the United States.

XI.

That immediately after plaintiff was informed of the entry of said judgment and during the term of court in which said judgment was entered, to wit: On the 26th day of June, 1930, this plaintiff through its attorneys served upon the attorneys for the defendants herein—plaintiffs in the action in the state court, and filed in said state court a motion to vacate and set aside said judgment on the ground that the same was void because said undertaking (Exhibit "A") shows on its face that it was given in behalf of said Singer Sewing Machine Company and not on behalf of said Ed Anderson and that it stayed execution only against said Company and that the reversal of the judgment against the Singer Sewing Machine Company and the dismissal of said Company from said action as provided in the judgment entered upon the filing of the remittitur from the Supreme Court (Exhibit "B") discharged plaintiff from all liability under said undertakng and that said District Court thereupon lost jurisdiction of the person of said Singer Sewing Machine Company, as well as of this plaintiff. That such proceedings were had on said motion to vacate and set aside said judgment that said District Court, after examining and considering said undertaking (Exhibit "A") and the statutes of the State of Idaho under which said undertaking was given and the decision of the Idaho Supreme Court in said cause (49 Ida., p. 231) and the judgment so

entered upon the filing of the remittitur (Exhibit "B"), construed said undertaking and held that it did not authorize the entry of any judgment against this plaintiff because of the default or failure of [7] the said Ed Anderson to pay the judgment theretofore entered against him as aforesaid in said action, and said District Court thereupon sustained the motion of this plaintiff and on the 12th day of August, 1930, said District Court made and entered an order vacating and setting aside said judgment on the ground that the same was void.

XII.

That the defendants Vivian F. Baldwin and E. R. Baldwin, plaintiffs in said action in the state court, thereupon appealed to the Supreme Court of the State of Idaho from the order vacating and setting aside said judgment and such proceedings were had on said appeal that on the 2d day of May, 1931, the Supreme Court of Idaho reversed said order so made on the 12th day of August, 1930, by said District Court vacating and setting aside said judgment, and said Supreme Court held in substance and effect that the application to the District Court for judgment on said undertaking presented a judicable inquiry, and that the District Court was without power or authority to vacate and set aside said judgment by a motion to vacate, and said Supreme Court of Idaho further held on said appeal that it was without power to construe said undertaking on the appeal so taken by the defendants herein from the order vacating said judgment and that it could not on said appeal determine or construe said

undertaking or determine whether the District Court had jurisdiction of the person of plaintiff at the time said judgment (Exhibit "C") was entered against this plaintiff, or whether said District Court had any power or authority to enter any judgment whatsoever against this plaintiff after said Singer Sewing Machine Company had been dismissed from said action. Plaintiff further shows and alleges that it did not know until long after said appeal had been determined and decided that said judgment against plaintiff [8] (Exhibit "C") had been made and entered at Chambers and not in open court, and said question was therefore not presented to or considered by the Supreme Court of the State of Idaho on said appeal.

XIII.

That in thus refusing to construe said undertaking for the purpose of ascertaining whether said District Court had jurisdiction of the person of plaintiff on June 23, 1930, when said judgment (Exhibit "C") was entered against it on said undertaking, and in refusing to determine or decide whether said District Court had power to enter the judgment purporting to have been so entered by said court but which, as hereinbefore alleged, was actually entered at Chambers, the Supreme Court of the State of Idaho departed from and changed the rule of decision and appellate practice and procedure which had been followed, sanctioned and approved by said court for upwards of forty years immediately prior to said decision, and the Supreme Court of the State of Idaho by said decision denied to plaintiff

the equal protection of the laws and due process of law in violation of the provisions relating thereto in the Fourteenth Amendment to the Constitution of the United States.

XIV.

That the remittitur from the Supreme Court on the appeal from said order vacating said judgment was filed in said District Court on June 3, 1931, and thereafter and on June 17, 1931, the defendants herein caused execution to issue upon said judgment (Exhibit "C") and caused said execution to be levied upon certain securities of this plaintiff deposited with the treasurer of the State of Idaho pursuant to the provisions of Section 5104 of the Compiled Statutes of Idaho 1919, to wit: Upon certain United States Fourth Liberty Loan Bonds bearing 4¼% interest of the par value of $25,000.00, and pursuant to such levy the [9] sheriff of Ada County has noticed said securities for sale on the 5th day of August, 1931, at 10:00 o'clock A. M. at the front door of the courthouse in Boise, Ada County, Idaho, and the proceeds from said securities will, as plaintiff is informed and believes and so alleges the fact to be, be paid over to the defendants herein and applied in satisfaction of the judgment which said defendants hold against the said Ed Anderson and which judgment this plaintiff has never assumed or agreed to pay and on which it has no liability whatsoever.

XV.

That at all times prior to on or about the 4th day of June, 1931, plaintiff and its attorneys relied

upon the recitals in said judgment (Exhibit "C") to the effect that the said Vivian F. Baldwin and E. R. Baldwin had moved the said state court for judgment on said undertaking (Exhibit "A"), instead of applying to the Judge of said court at Chambers, and this plaintiff had assumed as it had a right to assume, that said judgment was made in open court when in truth and in fact it was made in Chambers; that immediately upon obtaining information to the effect that said judgment had been made and entered at Chambers, this plaintiff moved the said District Court of the Third Judicial District of the State of Idaho in and for Ada County, to correct the recitals in said judgment in that respect and to make said judgment speak the truth so as to show that said judgment was actually entered at Chambers and not in open court and said motion is now pending before said District Court undetermined and undecided.

XVI.

That plaintiff has a good, valid and meritorious defense to any judgment on said undertaking (Exhibit "A") and particularly on the ground that said undertaking was not a joint [10] undertaking for both the Singer Sewing Machine Company and Ed Anderson, but was intended to be and was in fact an undertaking executed solely on behalf of said Singer Sewing Machine Company and for its benefit and not for the benefit of said Ed Anderson.

XVII.

That when said Singer Sewing Machine Company

was dismissed from said cause and awarded an affirmative judgment for its costs on the first appeal therein pursuant to the decision of the Supreme Court of the State of Idaho, reported as aforesaid in 49 Idaho Reports, pp. 231–239, inclusive, both said Singer Sewing Machine Company and plaintiff herein were released and relieved from any and all further liability in said cause. That the only opportunity plaintiff has had to present said defense to a court for adjudication was on its motion to vacate the judgment against it (Exhibit "C") and, as heretofore alleged, said District Court sustained the said motion after a full and complete consideration of said undertaking and made and entered an order vacating and setting aside said judgment, but, as heretofore alleged, said order was thereafter reversed and set aside by the Supreme Court of the State of Idaho without considering the merits of the case and without determining whether said judgment (Exhibit "C") had been legally or properly entered against this plaintiff, or whether any judgment whatsoever could be entered against plaintiff on said undertaking after said Singer Sewing Machine Company had been dismissed from said cause.

XVIII.

That plaintiff has no plain, speedy or adequate remedy at law against the judgment so entered against it as aforesaid; that said judgment is most unjust, inequitable, unconscionable and unfair and the manner in which the same was obtained is and was a fraud upon this plaintiff and upon said Dis-

trict Court, and [11] unless the defendants, their agents, attorneys and representatives, including the sheriff of Ada County, Idaho, be enjoined and restrained from selling the securities of this plaintiff now on deposit with the treasurer of the State of Idaho as aforesaid under the execution heretofore levied and notice of sale heretofore given as aforesaid, or otherwise, and from suing out any other or further executions and levying or attempting to levy and sell said securities, this plaintiff will be deprived of its property without due process of law and denied the equal protection of the laws, contrary to and in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States, and it will suffer great and irrepa rable injury and the loss of assets of a value in excess of $25,000.00; that if said securities be sold and the proceeds thereof paid over to the defendants, such proceeds will immediately be paid out and disbursed and said defendants are, as plaintiff is informed and believes and so alleges the fact to be, insolvent and unable to respond in damages for any loss that plaintiff may sustain by reason of such wrongful sale and loss of its securities and are and will be unable to repay or restore to plaintiff the proceeds so wrongfully received from the sale of said securities. That the sale of said securities will deprive plaintiff of the right to do a surety business in the State of Idaho and result in the cancellation of its license, certificate and authority to do business in said state; that the surety business is the only business in which plaintiff is engaged and from which it derives a profit.

WHEREFORE, plaintiff prays this Honorable Court:

(a) That a writ of injunction may issue, preliminary until final hearing and perpetual thereafter, enjoining and restraining the said defendants and each of them, their agents, attorneys, representatives and assigns, including the sheriff of Ada County, Idaho, his deputies and successors in office, [12] and each and every of them, from enforcing or attempting to enforce as against this plaintiff the said judgment bearing date on or about the 23d day of June, 1930, and purporting to have been made and entered by the District Court of the Third Judicial District of the State of Idaho, in and for Ada County, in the cause wherein the defendants Vivian F. Baldwin and E. R. Baldwin were plaintiffs and Ed Anderson and Singer Sewing Machine Company were defendants, a copy of which is attached to the bill of complaint as Exhibit "C," and from applying for and seeking to obtain execution thereon and from levying or attempting to levy upon or selling or attempting to sell under any such execution or under any order or writ issued or purporting to be issued under said judgment or for the enforcement thereof, the bonds and securities of this plaintiff on deposit with the treasurer of the State of Idaho under Section 5104 of the Compiled Statutes of Idaho, and from harassing and annoying this plaintiff with attempting to collect or threatening to collect or enforce said judgment or collecting or attempting to collect the same from this plaintiff.

(b) That said defendants and each of them, their agents, attorneys, representatives and assigns, and each and every of them, be ordered and directed to forthwith desist and refrain from taking any further proceedings under the execution issued out of the District Court of the Third Judicial District of the State of Idaho on or about the 17th day of June, 1931, for the enforcement of said judgment and under which said defendants have caused the sheriff of said Ada County to levy upon the bonds and securities of this plaintiff on deposit with the treasurer of the State of Idaho under said Section 5104 of the Compiled Statutes of Idaho, and to desist and refrain from proceeding further with the sale of said securities; that they be [13] ordered and directed to abandon, cancel and annul all notices given and steps taken for levying upon and selling said securities.

(c) That plaintiff may have such other and further relief as may be just and equitable in the premises, and for its costs herein.

RICHARDS & HAGA,
McKEEN F. MORROW,
MARTIN & MARTIN,
FRANK MARTIN,
Solicitors for Plaintiff.
Residence: Boise, Idaho.

OLIVER O. HAGA,
Of Counsel.

State of Idaho,
County of Ada,—ss.

Oliver O. Haga, being first duly sworn, upon his

oath, deposes and says: That he is one of the attorneys of record for American Surety Company of New York, plaintiff in the above-entitled suit; that he makes this verification for and on behalf of said plaintiff for the reason that he is more familiar with the facts set forth in said bill of complaint than is any of the officers of said plaintiff and for the further reason that no officer of said plaintiff resides within or is now in the State of Idaho or Ada County, where this affiant resides; that he has obtained his information as to the matters set forth in said bill of complaint from the official records of the District Court of the Third Judicial District of the State of Idaho, in and for Ada County, and from the records and decisions of said court and from the Supreme Court of the State of Idaho and from other sources which he believes to be reliable; that he has read the above and foregoing complaint and believes the facts therein stated to be true.

OLIVER O. HAGA.

Subscribed and sworn to before me this 6th day of July, 1931.

[Seal] H. M. JEFFREY,
Notary Public for Idaho,
Residence: Boise, Idaho. [14]

## EXHIBIT "A."

In the District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada.

VIVIAN F. BALDWIN and E. R. BALDWIN,
Plaintiffs,

vs.

SINGER SEWING MACHINE COMPANY, a Corporation, and ED ANDERSON,
Defendants.

### UNDERTAKING ON APPEAL.

Whereas the defendant, Singer Sewing Machine Company, a corporation, in the above-entitled action has appealed to the Supreme Court of the State of Idaho from the judgment made and entered against it in the above-entitled action and in the above-entitled court in favor of the plaintiffs in said action on the 31st day of May, 1928, for the sum of Nineteen Thousand Five Hundred ($19,500.00) Dollars and for Seventy-three and 70–100 ($73.70) Dollars costs in said suit, making a total of Nineteen Thousand Five Hundred Seventy-three and 70–100 ($19,573.70) Dollars, and from the whole of said judgment;

AND WHEREAS, the said appellant, Singer Sewing Machine Company, a corporation, is desirous of staying the execution of said judgment so appealed from;

NOW, THEREFORE, the undersigned American Surety Company, a corporation authorized to, and doing business in the State of Idaho, in consideration of the premises and of such appeal on the part of said appellant, Singer Sewing Machine Company, a corporation, does hereby acknowledge itself firmly bound in the sum of Twenty-five Thousand ($25,000.00) Dollars, gold coin of the United States, that if the said judgment appealed [15] from, or any part thereof, be affirmed, or the appeal dismissed, the appellant will pay in gold coin of the United States of America, the amount directed to be paid as to which said judgment shall be affirmed, if affirmed only in part, and all damages and costs which may be awarded against the appellant upon the appeal, and that if the said appellant does not make such payment within thirty days from the filing of the remittitur from the Supreme Court in the court from which the appeal is taken, judgment may be entered on motion of the respondents in their favor and against the undersigned surety for the said sum of Nineteen Thousand Five Hundred Seventy-three and 70–100 ($19,573.70) Dollars, together with the interest that may be due thereon and the damages and costs which may be awarded against the said appellant, Singer Sewing Machine Company, upon the appeal.

IN WITNESS WHEREOF, the said American Surety Company, has caused its name and seal to be

attached hereto by its proper officers and agents at Boise, Idaho, this 28th day of August, 1928.

AMERICAN SURETY COMPANY OF NEW YORK.

By HOWARD E. STEIN,
Attorney-in-fact.

Countersigned:

HOWARD E. STEIN,
Agent at Boise, Idaho.

Countersigned:

(Seal) RICHARDS & HAGA.
O. O. HAGA.

It is hereby agreed that the within bond is hereby accepted in so far as the amount is concerned without regard [16] to it being double the amount of the judgment.

Dated at Boise, Idaho, this 29th day of August, 1928.

JAMES F. AILSHIE, Jr.,
J. R. SMEAD,
Attorneys for Plaintiffs.
Residence: Boise, Idaho. [17]

EXHIBIT "B."

In the District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada.

VIVIAN F. BALDWIN and E. R. BALDWIN,
Plaintiffs,

vs.

SINGER SEWING MACHINE COMPANY, a Corporation, and ED ANDERSON,
Defendants.

JUDGMENT.

This cause coming on regularly to be heard on the 21st day of May, 1928, before the court and a jury, and a judgment being regularly and duly entered and filed on May 31st, 1928, whereby the plaintiffs were given judgment against the defendants in the sum of Nineteen Thousand Five Hundred Dollars; thereafter the said defendants having appealed to the Supreme Court of the State of Idaho, from the judgment made and entered herein, and thereafter, and on May 10th, 1930, the Supreme Court of the State of Idaho made and entered its decision in this matter reversing said judgment as to the defendant Singer Sewing Machine Company, and the remittitur of the Supreme Court having been duly issued out of the said Supreme Court and filed with the Clerk of this court on May 22nd, 1930, by the terms of which it was ordered and adjudged that the judgment of the District Court made and

entered as hereinabove set out against the Singer Sewing Machine Company be reversed and the cause of action dismissed as to said defendant, Singer Sewing Machine Co., and affirmed as to defendant Ed. Anderson.

Now, therefore, in accordance with the said decision and remittitur and in compliance therewith, [18]

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, AND THIS DOES ORDER, ADJUDGE AND DECREE that the plaintiffs Vivian F. Baldwin and E. R. Baldwin take nothing from defendant Singer Sewing Machine Co., and that the said cause of action be, and the same is hereby dismissed as to the defendant Singer Sewing Machine Company, a corporation.

And in further complaince with said remittitur of the Supreme Court of the State of Idaho, the said defendant Singer Sewing Machine Company, a corporation, is hereby given judgment against the said Vivian F. Baldwin and E. R. Baldwin for the sum of Four Hundred Eighty-eight and 55–100 Dollars ($488.55) as and for its costs incurred in the Supreme Court, together with interest thereon at the rate of seven per cent per annum from May 10th, 1930; and the said defendant, Singer Sewing Machine Company, is hereby given judgment against the said plaintiffs Vivian F. Baldwin and E. R. Baldwin for the sum of $ ———, its costs incurred upon the trial of this cause in the District Court, making a total judgment that the said Singer Sewing Machine Company, a cor-

poration, do have and recover of and from the said Vivian F. Baldwin and E. R. Baldwin in the sum of $ ——.

Done and dated in open court this 24 day of May, 1930.

DANA E. BRINCK,
District Judge. [19]

## EXHIBIT "C."

In the District Court of the Third Judical District of the State of Idaho, in and for the County of Ada.

VIVIAN F. BALDWIN and E. R. BALDWIN,
Plaintiffs,

vs.

ED ANDERSON and AMERICAN SURETY COMPANY OF NEW YORK, a Corporation, Surety.

Defendants,

## JUDGMENT.

In the above-entitled cause the plaintiffs, having recovered judgment herein, on the 31st day of May, 1928, against the defendant Ed. Anderson and Singer Sewing Company, a corporation, for the sum of $19,500.00 with interest at seven per cent per annum from said date, and the said defendant Ed. Anderson and Singer Sewing Company having appealed to the Supreme Court of the State of Idaho from the said judgment, and an undertaking having been executed by the American Surety Company

of New York, a corporation, authorized to act as surety in the State of Idaho, having been given to plaintiffs as respondents upon the said appeal for the stay of execution of said judgment, pending said appeal in accordance with the provisions of Section 7155, Idaho Compiled Statutes, and by which undertaking the said American Surety Company of New York, a corporation, did undertake and obligate itself to the plaintiffs herein under the said statutory obligations in the sum of $25,000.00, and having thereby obligated itself to the effect that if the said judgment so appealed from, or any part thereof, should be affirmed the said American Surety Company of New York, a corporation, would pay the amount directed to be paid by the said judgment, or part thereof which should be affirmed, and all damages and costs which should be awarded plaintiffs, and providing that upon the failure to make payment [20] within thirty days after the filing of the remittitur from the Supreme Court in the above-entitled District Court, from which said appeal was taken, judgment might be entered on motion of said plaintiffs in their favor against the said surety company, to-wit, the American Surety Company of New York, for such amount together with interest that might be due thereon, and the damages and which might be awarded in favor of plaintiffs upon the appeal; and said appeal to the Supreme Court of the State of Idaho by the said defendant Ed. Anderson and Singer Sewing Machine Company having been affirmed in part and reversed in part, viz:

"Reversed as to appellant Singer Sewing Machine Company, affirmed as to appellant Anderson."

and the remittitur from the Supreme Court of Idaho to the above-entitled District Court having been filed in the office of the Clerk of the above-entitled Court on May 22nd, 1930, and costs having been taxed in favor of plaintiffs and against the defendant Ed. Anderson in the sum of $40.00, and more than thirty days having elapsed since the filling of said remittitur from the Supreme Court in the District Court, and defendant Ed. Anderson having failed to pay the said judgment as affirmed, or any part thereof, and the plaintiffs having moved the Court for a judgment against the said American Surety Company of New York, a corporation, and the court being fully advised in the premises:

DOES HEREBY ORDER AND ADJUDGE, That the plaintiffs do have and recover of and from the American Surety Company of New York, a corporation, the sum of $19,500.00, together with the sum of $2,817.21 interest thereon at the rate of seven per cent per annum from the 31st day of May, 1928, to the 23rd [21] day of June, 1930, together with $40.00 costs as provided for in the remittitur of the Supreme Court of Idaho, making the total sum of $22,357.21, together with interest thereon at the rate of seven per cent per annum from date hereof until paid, and that the plaintiffs have execution therefor.

Done in open court this 23d day of June, 1930.

CHARLES F. KOELSCH,
District Judge. [22]

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[Endorsed]: Filed Jul. 6, 1931.

[Title of Court and Cause.]

MOTION FOR TEMPORARY INJUNCTION.

Comes now the plaintiff in the above-entitled suit, by its solicitors, Messrs. Richards & Haga, and Martin & Martin, and moves this Honorable Court to grant a writ of injunction against said defendants and each of them, and their and each of their agents, attorneys, clerks, employees and representatives and all persons acting under the authority or direction of said defendants, or either of them, or their attorneys, pending this suit and until the further order of this court, conformable to the prayer of plaintiff's bill of complaint in this cause.

This motion is based on plaintiff's verified bill of complaint this day filed.

RICHARDS & HAGA,
McKEEN F. MORROW
MARTIN & MARTIN,
Solicitors for Plaintiff.
Residence: Boise, Idaho.
OLIVER O. HAGA,
Of Counsel. [23]

[Endorsed]: Filed Jul. 9, 1931.

[Title of Court and Cause—No. 1626.]

STIPULATION RE CONTINUING HEARING OF COMPLAINANT'S MOTION FOR TEMPORARY INJUNCTION.

It is stipulated by and between Messrs. Richards and Haga, McKeen F. Morrow, Martin and Martin, Frank Martin, and Oliver O. Haga, solicitors for complainant, and James F. Ailshie, Jr., and J. R. Smead, solicitors for defendants, that the hearing of complainant's motion for a temporary injunction in the above-entitled cause heretofore fixed for the hour of 10 o'clock A. M., on Thursday, the 9th day of July, 1931, be continued to the hour of 10 o'clock A. M., on Tuesday, July 28th, 1931.

It is further stipulated and agreed that defendants by entering into this stipulation do not waive any rights or defenses to complainant's bill of complaints or motion based thereon, and expressly reserve each and every objection and exception for which they may legally contend, including all objections to the jurisdiction of the court.

It is further agreed that defendants will file such affidavits, records, motions, pleadings or other matters, as they may see fit, on or before the 21st day of July, 1931, and that complainant shall serve any counter-showing on or [24] before July 25th, 1931, and defendants have to the hour of 10 o'clock A. M., July 28th, 1931, to reply to complainant's counter-showing.

Briefs of both parties to be served and filed at the time of hearing.

Dated this 8th day of July, 1931.

RICHARDS & HAGA,
McKEEN F. MORROW,
OLIVER O. HAGA,
MARTIN & MARTIN,
FRANK MARTIN,
Solicitors for Complainant.
JAMES F. AILSHIE, Jr.,
J. R. SMEAD,
Solicitors for Defendants. [25]

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[Endorsed]: Filed Jul. 22, 1931.

[Title of Court and Cause—No. 1626.]

## SHOWING IN OPPOSITION TO MOTION FOR TEMPORARY INJUNCTION.

To the Honorable CHARLES C. CAVANAH, Judge of the District Court of the United States for the District of Idaho.

Come now Vivian F. Baldwin and E. R. Baldwin, defendants above named, by and through their solicitors, James F. Ailshie, Jr., and J. R. Smead, and in opposition to complainant's motion for a temporary writ of injunction herewith file the following affidavits, certified records and other documents as follows, to wit:

Affidavit of Honorable Charles F. Koelsch.
Affidavit of James F. Ailshie, Jr.
Affidavit of J. R. Smead.

Certified copy of transcript on appeal to the Supreme Court of the State of Idaho in Case No. 5653 entitled Vivian F. Baldwin and E. R. Baldwin, Appellants, against Ed Anderson and American Surety Company of New York, a Corporation, Respondents.

Certified copy of opinion of the Supreme Court of the State of Idaho dated May 2, 1931, in said case No. 5653.

Certified copy of judgment entered by the Supreme Court of the State of Idaho in said Case No. 5653, together with certified copy of filing of remittitur of the Supreme Court of Idaho in said Case No. 5653 in the District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada. [26]

Certified copy of writ of execution issued June 17, 1931, out of the District of the Third Judicial District of the State of Idaho in and for Ada County in the case of Vivian F. Baldwin and E. R. Baldwin, plaintiffs, against Ed. Anderson and American Surety Company of New York, a Corporation, defendants, together with:

Affidavit of J. Emer Harris.

Affidavit of James Brandon.

Affidavit of John McGrath.

Certified copy of notice of levy of writ of execution.

Notice of sheriff's sale.

From the records and files of Case No. 11860 in the District Court of the Third Judicial District

of the State of Idaho in and for the County of Ada.

Notice of motion of American Surety Company, together with motion to vacate and set aside the judgment against it entered June 23, 1930, and moving papers in support thereof.

Certified copy of objections of Vivian F. Baldwin and E. R. Baldwin to the consideration of American Surety Company's motion to vacate and set aside the judgment of June 23.

Certified copy of certificate and affidavits filed in opposition to American Surety Company's motion to vacate and set aside, together with the following:

Certified copy of certificate of Charles F. Koelsch as Judge of the Third Judicial District of the State of Idaho.

Reporter's transcript, together with order of Charles F. Koelsch as Judge of the Third Judicial District of the State of Idaho settling the same as a correct record of statement made by him on hearing of American Surety Company's motion to vacate and set aside held June 30, 1931.

Certified copy of affidavit of James F. Ailshie, Jr.

Certified copy of affidavit of J. R. Smead.

Certified copy of notice of appeal of American Surety Company to the Supreme Court of the State of Idaho from that certain judgment entered June 23, 1930.

Certified copy of undertaking for costs on said appeal filed by American Surety Company.

Certified copy of notice of appeal of American Surety Company from that certain order made and entered on July 13, 1931, denying and overruling American Surety Company's motion to vacate the judgment of June 23, 1930.

Certified copy of undertaking for costs on said appeal filed by American Surety Company. [27]

Certified copy of application of American Surety Company for order for reporter's transcript.

Certified copy of minutes of the District Court of the Third Judicial District for the State of Idaho for July 13, 1931.

Certified copy of order entered July 13, 1931.

Certificate of Clerk of the Third Judicial District of the State of Idaho in and for the County of Ada.

Defendants pray that the plaintiff's motion for a temporary writ of injunction be denied and that they recover their costs and disbursements herein and defendants will ever pray.

JAMES F. AILSHIE, Jr.,
J. R. SMEAD,
Solicitors for Defendants.

Residence and Postoffice Address: Boise, Idaho.

Service admitted this 21st day of July, 1931.

RICHARDS & HAGA,
MARTIN & MARTIN,
Solicitors for Complainant. [28]

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DEFENDANT'S SHOWING No. 1.

5.

In the District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada.

VIVIAN F. BALDWIN and E. R. BALDWIN,
Plaintiffs,

vs.

SINGER SEWING MACHINE COMPANY, a Corporation, and ED. ANDERSON,
Defendants.

JUDGMENT.

The plaintiffs in the above-entitled cause having heretofore filed their complaint herein and the defendants and each of them having thereafter appeared and filed respectively their separate answers to said complaint; and thereafter, on the 21st day of May, 1928, said cause having come on for trial of the issues so made up; and the jury having been duly impaneled and sworn to try said cause, and thereupon plaintiffs and defendants having offered evidence both oral and documentary in support of their respective allegations, and the said jury having been duly instructed by said court and having

heard argument by the respective counsel of record of said parties herein, and having thereupon retired to consider of their verdict;

And the said jury having thereafter returned to court and having returned in said cause their verdict, which was duly read and filed herein, in the following language, to wit: [32]

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We, the jury, in the above-entitled cause find for the plaintiffs, Vivian F. Baldwin and E. R. Baldwin and against the defendants, Singer Sewing Machine Company, a corporation, and Ed. Anderson in the sum of $19,500.00.

J. E. BURNETT, Foreman.

No. 11860—Filed 5:22 P. M., May 25, 1928. Stephen Utter, Clerk. By B. Clyde Eagleson, Deputy.

NOW, THEREFORE, it is hereby ordered, adjudged and decreed that the said plaintiffs, Vivian F. Baldwin and E. R. Baldwin, do have and recover from the said defendants, Singer Sewing Machine Company, a corporation, and Ed. Anderson, the sum of Nineteen Thousand Five Hundred ($19,500.00) Dollars together with plaintiffs' costs in this behalf laid out and expended, which are hereby taxed at the sum of $

CLINTON H. HARTSON,
District Judge.

[Endorsed]: Filed May 31st, 1928.

[Title of Court and Cause.]

NOTICE OF APPEAL.

To Vivian F. Baldwin and E. R. Baldwin, Plaintiffs, James F. Ailshie, Jr., and J. R. Smead, Their Attorneys, and to Stephen Utter, Clerk of the Above-entitled Court:

You and each of you will please take notice, that

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[33] the defendants, Singer Sewing Machine Company, a corporation, and Ed Anderson, hereby appeal to the Supreme Court of the State of Idaho, from that certain judgment entered in the above-entitled action on the 31st day of May, 1928, for the sum of $19,573.70, against the defendants, and each of them, and from the whole thereof.

Dated August 27, 1928.

MARTIN & MARTIN and
H. B. WALKER,
Attorneys for Defendants.
Residence: Boise, Idaho.

(Duly served.)

[Endorsed]: Filed August 27th, 1928. [34]

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[Title of Court and Cause.]

NOTICE OF MOTION.

To the Above-named Plaintiffs and to James F. Ailshie, Jr., and J. R. Smead, Their Attorneys:

YOU AND EACH OF YOU are hereby notified that on the 28th day of June, 1930, at 10:00 o'clock A. M., or as soon thereafter as counsel can be heard

at the courtroom of the above-entitled court in Boise, Idaho, the undersigned American Surety Company of New York will move the Court to vacate the judgment made and entered in the above-entitled action in favor of the above-named plaintiffs and against the said American Surety Company of New York on the 23d day of June, 1930, and to stay all proceedings issued under execution upon said judgment.

Said motion will be made upon the records and files in this action, including the supersedeas bond on which said judgment is based, and the affidavit of McKeen F. Morrow. A copy of said motion [48]



to which is attached a copy of said supersedeas bond and a copy of said affidavit of McKeen F. Morrow, is hereto attached and herewith served upon you.

Dated this 26th day of June, 1930.

RICHARDS & HAGA,
MARTIN & MARTIN,
Attorneys for American Surety Company of New York, a Corporation.

[Title of Court and Cause.]

MOTION.

Comes now American Surety Company of New York, a New York corporation, and moves this Honorable Court to vacate and set aside that certain judgment against said American Surety Company of New York, made and entered in the above-entitled cause on the 23d day of June, 1930, upon the following grounds and for the following reasons, to wit:

I.

That said judgment is void in that the supersedeas bond on which said judgment is based shows on its face that it was given on the appeal of the Singer Sewing Machine Company in this action and for the purpose of staying execution against that company, that said bond did not stay or purport to stay said judgment against the other defendant, Ed. Anderson, and it appears from said judgment and the records and files in this action

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that the Supreme [49] Court of Idaho reversed the judgment against said appellant, Singer Sewing Machine Company, from which it appealed, and that upon the remittitur from said Supreme Court this Court vacated the said judgment appealed from as to Singer Sewing Machine Company, dismissed said action as against it, and entered judgment in its favor against plaintiffs herein on or about May 24, 1930.

II.

That said judgment is void in that the supersedeas bond on which said judgment is based shows on its face that the said American Surety Company of New York executed said bond solely in consideration of the appeal by Singer Sewing Machine Company from the judgment entered herein on or about May 31, 1928, and said appeal was sustained and there has, therefore, been no breach of the condition of the bond.

III.

That the enforcement of said judgment is contrary to good conscience and equity because the said

supersedeas bond on which said judgment is based was executed solely in consideration of that certain appeal taken by said Singer Sewing Machine Company from the judgment herein entered on or about May 31, 1928, and for the purpose of staying execution on said judgment against said Singer Sewing Machine Company and the appeal of said Singer Sewing Machine Company was sustained and pursuant to the remittitur from the Supreme Court of Idaho, judgment was entered herein on or about

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[50] May 24, 1930, to the effect that plaintiffs take nothing in said action against said Singer Sewing Machine Company, and that the case be dismissed as to said company, and that Singer Sewing Machine Company have judgment against plaintiffs herein for the sum of Five Hundred Twenty-two and 85–100 Dollars ($522.85), and it is, therefore, contrary to good conscience and equity to enter judgment against the said American Surety Company of New York, as surety, when no recovery can be had against its sole principal on said supersedeas bond.

IV.

That said judgment was entered without notice to the said American Surety Company of New York or the said Singer Sewing Machine Company.

And said American Surety Company of New York further moves this Court to stay all proceedings under execution upon said judgment pending the determination of this motion.

Said motion is based on the records and files in

this action, including a copy of the said supersedeas bond hereto attached and made a part hereof, and the affidavit of McKeen F. Morrow hereto attached and made a part hereof.

RICHARDS & HAGA,
MARTIN & MARTIN,
Attorneys for American Surety Company of New York.

Residence: Boise, Idado.

[Endorsed]: Filed June 26, 1930. [51]

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[Title of Court and Cause.]

AFFIDAVIT OF McKEEN F. MORROW.

State of Idaho,
County of Ada,—ss.

McKeen F. Morrow, being first duly sworn, upon his oath, deposes and says: That he is a [54]

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member of the firm of Richards & Haga, attorneys for American Surety Company of New York, and makes this affidavit on behalf of said American Surety Company of New York for the reason that all of its officers reside outside the State of Idaho, where attorneys for said party reside, and that he has personal knowledge of the facts herein set forth; that the judgment entered herein in favor of plaintiffs and against American Surety Company of New York, a corporation, surety, was made and entered without notice to said American Surety Company of New York or any of its officers or agents; that after the entry of said judgment and on or about

the 24th day of June, 1930, the said plaintiffs, through their attorneys, caused execution to issue from the above-entitled court upon said judgment and thereupon delivered said execution to the sheriff of Ada County, together with a written demand addressed to the treasurer of the State of Idaho for delivery of certain United States Liberty Bonds held by said state treasurer pursuant to Section 5104, Compiled Statutes of Idaho, sufficient to satisfy said judgment. That thereupon the said sheriff of Ada County served said writ of execution upon Byron Defenbach, Treasurer of the State of Idaho, on said 24th day of June, 1930, and presented a written demand for delivery of bonds deposited with said state treasurer by the said American Surety Company of New York sufficient in amount to satisfy said judgment, and thereupon the said Byron Defenbach, Treasurer of the State of Idaho, delivered to the said sheriff of Ada County certain

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registered United States Liberty [55] Bonds payable to the Treasurer of the State of Idaho, bearing four and one-quarter per cent interest, maturing 1933–1938, numbered as follows: Bonds 46289 and 46290, $10,000 each; bonds 559144, 559145 and 559146, $1,000 each, together with the unmatured coupons attached thereto. That the said sheriff of Ada County, Idaho, at the request of attorneys for plaintiffs thereupon issued and posted a certain notice of sale to the effect that said bonds would be sold at public auction to the highest bidder for cash on Monday, June 30, 1930, at 10:00

o'clock A. M. That the levy of said execution and the taking possession of said bonds and the advertising of said bonds for *said as* aforesaid is in violation of the provisions of Section 5104, Idaho Compiled Statutes, 1919.

McKEEN F. MORROW.

(Duly verified.) [56]

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MINUTES OF THE PROCEEDINGS OF THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR ADA COUNTY, ON AUGUST 12, 1930—JOURNAL Y, PAGE 155.

No. 11,860.

VIVIAN F. BALDWIN,

Plaintiff,

vs.

SINGER SEWING MACHINE COMPANY et al.,

Defendants.

In this cause the motion to declare the judgment void and to set the same aside having been heretofore taken under advisement, the court at this [58]

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time rendered its decision and granted said motion and ordered counsel for the Surety Company to prepare the proper order to this effect to which ruling the plaintiffs duly excepted, which exception was allowed by the Court.

CHARLES F. KOELSCH,

District Judge. [59]

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[Title of Court and Cause.]

NOTICE OF APPEAL.

To Singer Sewing Machine Company, a Corpora-

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tion, and Messrs. Martin & Martin [61] and H. B. Walker, Its Attorneys, Ed Anderson and Messrs. Martin & Martin and H. B. Walker, His Attorneys, American Surety Company of New York and Messrs. Richards & Haga and Martin & Martin, Its Attorneys, and to Stephen Utter, Clerk of the Above-entitled District Court:

YOU AND EACH OF YOU will please take notice that the plaintiffs hereby appeal to the Supreme Court of the State of Idaho from that certain order, made and entered in the above-entitled action on the 12th day of August, 1930, which said order vacates and holds as void that certain judgment entered in favor of plaintiffs and against the American Surety Company of New York on the 23d day of June, 1930, for the sum of $22,357.21, together with interest.

Dated this 19th day of August, 1930.

JAMES F. AILSHIE, Jr.,
J. R. SMEAD,
Attorneys for Plaintiffs.

Service admitted this 19th day of August, 1930.

MARTIN & MARTIN,

Attorneys for Singer Sewing Machine Company.

RICHARDS & HAGA,

Attorneys for American Surety Company of New York.

H. B. WALKER,

Attorney for Ed. Anderson.

[Endorsed]: Filed August 19, 1930. [62]

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[Title of Court and Cause.]

CERTIFICATE.

We, the undersigned, James F. Ailshie, Jr., and J. R. Smead, attorneys for Vivian F. Baldwin and

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[65] E. R. Baldwin; Martin & Martin, attorneys for Singer Sewing Machine Company, a corporation; H. B. Walker, attorney for Ed. Anderson; and Richards & Haga and Martin & Martin, attorneys for American Surety Company of New York, a corporation, do hereby certify the foregoing transcript of pages numbered from 5 to 38, inclusive, to be full, true and correct copies of the pleadings and proceedings in the above-entitled cause, and that the same constitute the transcript of the record herein upon appeal to the Supreme Court of the State of Idaho, and that we have compared the foregoing transcript with the original papers in the above-entitled action of Vivian F. Baldwin and E. R. Baldwin, plaintiffs, vs. Ed. Anderson, defendant, and American Surety Company of New York,

a corporation, surety, in the district court of the third judicial district of the State of Idaho, in and for the county of Ada, and on file of record in the office of the clerk of said district court, and certify that the foregoing transcript contains true and correct copies of the following papers and matters, to wit:

1. The following from the records and files of Baldwin et al. vs. Singer Sewing Machine Company and Ed. Anderson:

Judgment in favor of plaintiffs entered May 31, 1928.

Notice of appeal of the defendants, dated August 27, 1928.

Undertaking on said appeal, filed August 29, 1928.

Supersedeas bond on said appeal, filed August 29, 1928. [66]

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Order directing reporter to prepare a transcript of the evidence upon the trial of said cause, dated August 29, 1928.

Praecipe to Clerk of the defendants in said case.

Notice of appeal by defendant Anderson from order denying new trial.

Notice of appeal by defendant Singer Sewing Machine Company from order denying new trial.

Remittitur of the Supreme Court of Idaho.

Judgment entered May 24, 1930, pursuant to said remittitur.

2. And the following from the records and files herein:

Judgment against the American Surety Company, dated June 23, 1930.

Motion, dated June 26, 1930, to vacate and set aside as void said judgment against the American Surety Company, together with supporting affidavit.

Stipulation and order approving the same, filed August 9, 1930.

Order of District Court granting said motion to vacate judgment against the American Surety Company.

Notice of appeal of Vivian F. Baldwin and E. R. Baldwin from said order.

Undertaking on said appeal.

Minutes of the court of August 12, 1930.

Certificate of trial Judge of papers and files used upon the hearing and decision of said motion.

The praecipe.

We further certify that an undertaking on appeal in due form was filed in said action on the 19th day of August, 1930. [67]

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FURTHER, It is stipulated that the foregoing transcript shall be used in lieu of and with the same force and effect as a Clerk's transcript of the foregoing papers and matters, and that this certificate shall in all respects have the same force and effect of a certificate of the Clerk of the district court of the third judicial district of the State of Idaho, in and for the county of Ada, duly executed.

Dated this 5th day of September, 1930.

JAMES F. AILSHIE, Jr.,
J. R. SMEAD,
Attorneys for Plaintiffs.
H. B. WALKER,
Attorney for Defendant Ed. Anderson.
MARTIN & MARTIN,
Attorneys for Singer Sewing Machine Company, a Corporation.
RICHARDS & HAGA,
MARTIN & MARTIN,
Attorneys for American Surety Company of New York, a Corporation.

Service of the foregoing transcript is hereby admitted this 11th day of September, 1930.

(Signed) H. B. WALKER,
Attorney for Ed. Anderson.
(Signed) MARTIN & MARTIN,
Attorneys for Singer Sewing Machine Company.
(Signed) RICHARDS & HAGA,
(Signed) MARTIN & MARTIN,
Attorneys for American Surety Company of New York. [68]

In the Supreme Court of the State of Idaho.

No. 5653.

Boise, Jan. Term, 1931.

Filed May 2, 1931. Clay Koelsch, Clerk.

VIVIAN F. BALDWIN and E. R. BALDWIN,
Appellants,

vs.

ED ANDERSON and AMERICAN SURETY COMPANY OF NEW YORK, a Corporation,
Respondents.

OPINION OF SUPREME COURT (McNAUGHTON, J.).

Appeal from the District Court of the Third Judicial District, for Ada County. Hon. Charles F. Koelsch, Judge.

Appeal from an order setting aside judgment on supersedeas undertaking. Reversed.

JAMES F. AILSHIE, Jr., and J. R. SMEAD, for Appellants.

MARTIN & MARTIN, H. B. WALKER, and RICHARDS & HAGA, for Respondents.

McNAUGHTON, J.—This is an appeal from an order setting aside as void a judgment against a bondsman. The judgment against the respondent company was entered pursuant to C. S., sec. 7155, on an undertaking on appeal.

Appellants Baldwin, as plaintiffs, had procured a judgment against Ed. Anderson and the Singer

Sewing Machine Company as defendants in the District Court. The defendants jointly gave notice of appeal and appealed the case to the Supreme Court. On appeal the following undertaking was executed and filed:

"Whereas the defendant, Singer Sewing Machine Company, a corporation, in the above-entitled action has appealed to the Supreme Court of the State of Idaho from the judgment made and entered against it in the above-entitled action and in the above-entitled court in favor of the plaintiffs in said action on the 31st day of May, 1928, for the sum of Nineteen Thousand Five Hundred ($19,500.00) Dollars and for Seventy-three and 70–100 ($73.70) Dollars costs in said suit, making a total of Nineteen Thousand Five Hundred Seventy-three and 70–100 ($19,573.70) Dollars, and from the whole of said judgment;

"AND WHEREAS, the said appellant, Singer Sewing Machine Company, a corporation, is desirous of staying the execution of said judgment so appealed from;

"NOW THEREFORE, the undersigned American Surety Company, a corporation authorized to, and doing business in the State of Idaho, in consideration of the premises and of such appeal on the part of said appellant, Singer Sewing Machine Company, a corporation, does hereby acknowledge itself firmly bound in the sum of twenty-five Thousand ($25,000.00) Dollars, gold coin of the United States, that if the said judgment appealed from,

or any part thereof, be affirmed, or the appeal dismissed, the appellant will pay in gold coin of the United States of [70] America, the amount directed to be paid as to which said judgment shall be affirmed, if affirmed only in part, and all damages and costs which may be awarded against the appellant upon the appeal, and that if the said appellant does not make such payment within thirty days from the filing of the remittitur from the Supreme Court in the court from which the appeal is taken, judgment may be entered on motion of the respondents in their favor and against the undersigned surety for the said sum of Nineteen Thousand Five Hundred Seventy-three and 70–100 ($19,573.70) Dollars, together with the interest that may be due thereon and the damages and costs which may be awarded against the said appellant, Singer Sewing Machine Company, upon the appeal.

"IN WITNESS WHEREOF, the said American Surety Company, has caused its name and seal to be attached hereto by its proper officers and agents at Boise, Idaho, this 28th day of August, 1928.

"AMERICAN SURETY COMPANY OF NEW YORK.

"By HOWARD E. STEIN,

"Attorney-in-fact."

In the Supreme Court the judgment was affirmed as to Anderson but reversed as to Singer Sewing Machine Company. The remittitur was filed in the District Court on May 22, 1930. Pursuant to the

remittitur, on May 24th the District Court entered judgment dismissing the case as to Singer Sewing Machine Company. On June 23d the appellants Baldwin moved for judgment against the American Surety Company on the undertaking, which they claimed stayed execution on the whole judgment. This motion was granted and judgment accordingly was entered. Thereafter the American Surety Company moved to vacate and set aside said judgment on the grounds that it was, (1) void, (2) contrary to good conscience, and (3) was entered without notice to the American Surety Company. The motion was granted and an order entered whereby said judgment was declared null and void, and was annulled, vacated and set aside. From this order the present appeal was taken.

Many assignments of error are made, but so far as this appeal is concerned we deem it necessary to consider only those which challenge the ruling of the lower court to the effect that the judgment against the Surety Company on the undertaking was void.

The briefs on both sides very ably and in great detail discuss the legal effect of the different provisions of the bond in light of the nature of the appeal. The appellants claim that the undertaking by its terms superseded and stayed execution upon the whole judgment and is conditioned to pay any part thereof affirmed by the Supreme Court, and that such being the conditions of the bond its recital of introductory facts is misleading and not controlling. On the other hand the respondents devote the major portion of their brief to the contention

that the recital of facts in the introductory part of the undertaking governs the condition and obligation of the undertaking; that such recitals limit the stay of execution to the Singer Sewing Machine Company only, and the obligation is to pay only such judgment in whole or in part as might be affirmed against the Singer Sewing Machine Company.

We disclaim any intention or right to construe the legal effect of the undertaking in question further than to examine it in aid of determining the sole question of the court's jurisdiction to hear and determine the motion for judgment thereon.

The surety company did not claim error, and appeal. It did not claim inadvertence or mistake. It challenged the court's jurisdiction and moved to set aside the judgment as void. The whole question here is a question of jurisdiction. Nothing further. Nothing else. [71]

If a court has jurisdiction of the parties, jurisdiction of the subject matter and jurisdiction of an issue of law or fact presented, then its judgment upon that issue is not void whether erroneous or not. Such judgments in the absence of mistake or, in a proper case, motion for new trial, may be corrected only by appeal. Bunnell and Eno etc. Co. vs. Curtis, 5 Ida. 652, 51 Pac. 767; Taylor vs. Hulett, 15 Ida. 265, 97 Pac. 37; Wyllie vs. Kent, 28 Ida. 16, 152 Pac. 194; United States Nat. Bank vs. Eldredge, 49 Ida. 363, 288 Pac. 416.

Regarding notice: Where a supersedeas undertaking for stay of execution is filed pursuant to C. S., sec. 7155, it is held the surety becomes a

party to the action and if the judgment stayed by the undertaking is affirmed in whole or in part and remains unsatisfied for thirty days the judgment creditor may move in the action for judgment on the undertaking against the surety, and it is unnecessary to give the Surety Company notice of such motion. Empire State-Idaho Min. & Developing Co. vs. Hanley, 136 Fed. 99; U. S. Fidelity & G. Co. vs. Ft. Misery Highway Dist., 22 Fed. (2d) 369; Gray vs. Cotton, (Cal.) 162 Pac. 1019; Portland Trust Co. vs. Havely, (Ore.) 61 Pac. 346.

It is claimed by respondent that these authorities are not in point because the legal effect of an undertaking is the same as that of a bond in that the party executing the undertaking is simply surety for a principal; that in this case the introductory recitals of the undertaking disclose that the principal is the Singer Sewing Machine Company, and that upon the action being dismissed as to it such dismissal was also a dismissal as to the Surety Company. We cannot accept this view. The undertaking is a complete independent contract. The obligation of its maker is not collateral or secondary. Moffat vs. Greenawalt, (Cal.) 27 Pac. 296. Its obligations are to be determined from the instrument itself. If the contract stayed the whole judgment and promised in consideration thereof to pay any part thereof affirmed in the Supreme Court which remained unpaid thirty days after the remittitur was filed, it remains a party to the action and liable until that obligation is satisfied.

As to jurisdiction of the subject matter of the motion: It is urgently claimed by the respondent that the District Court was without jurisdiction to render the judgment on the undertaking which was entered. As we understand respondents' argument on this phase it is to the effect that it becomes necessary for this court to construe the bond to determine whether the District Court had jurisdiction to enter the judgment. Quoting from Freeman on Judgments, 5th Ed, vol. 1, pp. 444, 445, respondents' argument proceeds:

> " 'Aside from these cases in which the purported judgment is in reality no judgment, and considering those cases in which there has been an attempt at judicial action by a competent court, a judgment is not regarded as void unless there was a total lack of jurisdiction to render it. There are in general three jurisdictional elements in every valid judgment namely, jurisdiction of the subject matter, jurisdiction of the person, *and the power or authority to render the particular judgment.* For the absence of any one of these elements, when properly apparent, the judgment may be vacated at any time, whether before or after the term or the time limited by statute for motions on statutory grounds, either on motion or of its own volition without suggestion.' "

The phrase in italics may be misleading. This matter is [72] somewhat clarified by the quotation from Gile vs. Wood, 32 Ida. 752, 188 Pac. 36, as follows:

> "In addition to the jurisdiction of the parties and the subject matter, it is necessary to the validity of a judgment that the Court should have jurisdiction of the question which its judgment assumes to decide, or of the particular remedy or relief which it assumes to grant."

In the Gile case an action was brought for the foreclosure of a mortgage. No allegation of indebtedness of defendant to plaintiff was contained in the complaint or claim made for a deficiency judgment. Nevertheless in the decree deficiency judgment was given. On motion, this provision of the decree was stricken as void for want of jurisdiction to award deficiency judgment. Had a question of right to deficiency judgment been presented to the court, and had the right to such relief been dependent upon a judicial construction, a very different question would have arisen on the motion to declare void. In such case clearly there might have been error, but the judgment would not have been void. The vice in Gile vs. Wood which rendered part of the judgment void was that the court adjudged there was a right to deficiency judgment though no such question was submitted to the court. The court's jurisdiction was not dependent upon a proper construction of any document. It was dependent upon the question of whether right to deficiency judgment was submitted to the court. That issue not being presented the judgment upon it was held to be void for want of jurisdiction to adjudge it, and it was set aside on motion. See, also, Maloney vs. Zipf, 41 Ida. 52, 237 Pac. 632.

In the case at bar the only question presented to the court was as to right to judgment on the bond which was presented to the court by appellants in the manner provided by statute for the submission of that issue. This challenged judicable inquiry. The question or issue presented was, did the Surety Company, in its undertaking, become a party liable for every part of the judgment appealed from which might be affirmed by the Supreme Court, or did it stipulate only as to such judgment or part thereof as might be affirmed against the Singer Sewing Machine Company? To answer this question the court must look to the bond. The issue required a construction of the bond as a whole. The trial court had jurisdiction of this question. It construed the bond in favor of appellants and against the Surety Company. It was not only in that court's power, but it was its duty, to decide the question submitted. In re Clerf, (Wn.) 104 Pac. 622; Windfrey vs. Benton, (Okla.) 106 Pac. 853. Whether it decided right or wrong its decision was a judgment which could be reviewed for error, if there was error, only by this court on appeal. Bunnell and Eno etc. Co. vs. Curtis, *supra;* Taylor vs. Hulett, *supra;* Wyllie vs. Kent, *supra;* United States Nat. Bank vs. Eldredge, *supra.* On appeal the question could be re-examined. The undertaking cannot be examined and its legal effect as to this issue be determined by us on this appeal. We may consider it only in so far as to determine whether its wording is such that it afforded color of legal right in appellants to judgment. That is to say, whether appellants' motion presented a legit-

inate question and was not an imposition or fraud upon the court. We think, regardless of what our construction of the bond might be, it cannot be said appellants held no right to submit the question. Nor can it be said that such submission was a fraud upon the court and on that ground its judgment was void.

We find the trial court, upon the motion for judgment on the bond, had jurisdiction of the parties and jurisdiction of the subject matter; that an issue was presented and it had jurisdiction [73] to construe the undertaking and decide the issue which its judgment assumes to decide. It follows the judgment was not void, even if erroneous in the construction, and that the trial court committed error in annulling and vacating it as void.

The order vacating the judgment is reversed, with costs to appellants.

Lee, C. J., Givens and Varian, JJ., concur. [74]

May 2, 1931.

BALDWIN

vs.

ANDERSON et al.

## DISSENTING OPINION OF SUPREME COURT (BUDGE, J.).

BUDGE, J., Dissenting.—In extension of the facts stated in the majority opinion, it appears that Vivian F. Baldwin and her husband instituted an action in the District Court against the Singer Sewing Machine Company, a corporation, and one

Anderson, to recover damages for personal injuries alleged to have been sustained by Vivian F. Baldwin as a result of being struck by an automobile driven by Anderson. The complaint alleged that at the time of the accident Anderson was an agent of the Sewing Machine Company acting within the scope of his employment. From a judgment against the Sewing Machine Company and Anderson an appeal was taken to this court, resulting in a reversal of the judgment against the Sewing Machine Company and affirmance of the judgment against Anderson.

To stay execution of the judgment of the trial court against the Sewing Machine Company pending appeal, the American Surety Company executed a supersedeas bond, in terms as set out in the majority opinion. Upon the going down of the remittitur of this court, filed in the office of the Clerk of the District Court May 22, 1930, and in compliance therewith, the trial court "ordered, adjudged and decreed . . . . that the plaintiffs Vivian F. Baldwin and E. R. Baldwin take nothing from defendant Singer Sewing Machine Company, and that the said cause of action be, and the same is hereby dismissed as to the defendant Singer Sewing Machine Company, a corporation."

On June 23, 1930, upon *ex parte* motion, appellants here, before a Judge other than the other who tried the original action, procured a judgment to be entered against the American Surety Company on the supersedeas bond. On June 26, 1930, upon notice and motion, respondents moved the court to set aside and vacate the judgment theretofore en-

tered against the American Surety Company, upon three grounds, (1) that the judgment was void; (2) that it was contrary to good conscience; and (3) that it was entered without notice to the American Surety Company. After a hearing and due consideration of the motion, and affidavit filed therewith, the court made the following order:

> "Now, therefore, it is hereby ordered, adjudged and decreed, that that certain judgment made and entered in the above entitled cause on June 23, 1930, against the American Surety Company of New York, a corporation, in the sum of $22,357.21, together with interest thereon at the rate of seven per cent per annum from date until paid, be, and the same hereby is, vacated, annulled and set aside, and the same is hereby declared to be null and void, and the execution issued pursuant thereto be, and the same hereby is quashed and recalled."

This appeal is taken from the above order.

In the majority opinion it is held that the lower court had jurisdiction to enter the judgment upon the supersedeas bond and that its action in this regard is not subject to be reviewed by notice and motion, but on appeal. This position to my mind is not tenable. This court has now before it the identical record it would have, had an appeal been taken. If the judgment entered upon the supersedeas bond is void upon its face and it so appears from the record, it was subject to attack upon notice and motion, or it was within the power of the trial court, upon its own motion, independent of any statute,

to vacate the judgment. Gile vs. Wood, 32 Ida. 752, 188 Pac. 36; Nixon vs. Tongren, 33 Ida. 287, 193 Pac. 731; Miller vs. Prout, 33 Ida. 709, 197 Pac. 1023; 15 Cal. Jur., [75] pp. 52–53, sec. 141; Dubois vs. Clark, (Colo.) 55 Pac. 750. Even though the judgment was not void upon the face of the record, it was nevertheless subject to be vacated upon motion made within a reasonable time by a showing of lack of jurisdiction of the court to enter it. Armitage vs. Horshoe Bend Co., 34 Ida. 179, 204 Pac. 1073; Nixon vs. Tongren, *supra;* Norton vs. Atchison, T. & S. F. R. Co., (Cal.) 30 Pac. 585, 32 Pac. 452, 33 A. S. R. 198; 14 Cal. Jur. pp. 1024 et seq.

The supersedeas bond upon its face and throughout its contents shows clearly that it was given to stay execution upon the judgment and the whole thereof entered against the Sewing Machine Company. Anderson's name nowhere appears in the bond, and in order to uphold the judgment entered upon the supersedeas bond it becomes necessary for the court to read into the bond that it was given to stay execution of the judgment against Anderson as well as against the Sewing Machine Company. This the court has no authority to do.

It is fallacious to contend that under a judgment joint in form but in fact and in law joint and several against two or more defendants, a stay of execution on such judgment in favor of one of the defendants pending an appeal is a stay of execution as against all of the defendants. It is likewise illogical to contend that a supersedeas bond stays proceedings in favor of a person not named in the bond.

Appellants were in a position at any time from the entry of the original judgment against the Sewing Machine Company and Anderson to execute upon the judgment against Anderson, the latter having furnished no supersedeas bond. C. S., secs. 7155, 6902 (amended, Sess. Laws 1929, p. 70); 23 C. J., p. 533; 3 C. J., p. 1324, sec. 1451; 2 Cal. Jur., p. 472, sec. 222; Drabant vs. Cure, (Pa.) 124 Atl. 340; State vs. Beveridge, (Or.) 218 Pac. 1112; Bergevin vs. Wood, (Cal.) 105 Pac. 935; Ex parte French, 100 U. S. 1, 25 L. Ed. 529.

The supersedeas bond is the foundation of the judgment obtained thereon and must be interpreted from its four corners. The surety is entitled to have his bond strictly construed. His liability cannot be extended by implication. He has a right to stand upon the exact words of his contract, and his liability is limited to the language of his bond. City of Pocatello vs. Fargo, 41 Ida. 432, 242 Pac. 297; Jackson vs. Barrett, 12 Ida. 465, 86 Pac. 270. With this principle in mind the bond should be examined for the purpose of determining whether the court had jurisdiction to enter the particular judgment. The court must not only have jurisdiction of the person and the subject matter but power and authority to render the particular judgment. In the opening of the bond we find this language:

> "Whereas, the defendant Singer Sewing Machine Company, a corporation, in the above-entitled action has appealed to the Supreme Court of the State of Idaho from the judgment made and entered against it in the above-en-

titled action in the above-entitled court in favor of the plaintiffs in said action . . . . and from the whole of said judgment."

The whole of said judgment against the Singer Sewing Machine Company, not the whole of the judgment against Anderson. Anderson is an entire stranger to the American Surety Company. That he was never thought of when the supersedeas bond was given is a fact apparent from the entire record. To read his name into the bond or to create a liability against the American Surety Company by reason of the fact that the judgment was rendered against Anderson and the Singer Sewing Machine Company is to do violence to the language of the bond. No language could be plainer to my mind, from a reading of the bond, [76] than that it was the intention of the American Surety Company to furnish a supersedeas bond for the Singer Sewing Machine Company alone. Had it intended to furnish a bond for both the Sewing Machine Company and Anderson, language would have been used to that effect. It names the Singer Sewing Machine Company in its bond, it refers to the judgment entered against the Sewing Machine Company in its bond, and the bond is given to stay execution against the whole of the judgment entered against the Sewing Machine Company. This is further emphasized by the next paragraph of the bond, which is as follows:

"And whereas, the said appellant, Singer Sewing Machine Company, a corporation, is

desirous of staying the execution of said judgment so appealed from."

What judgment? The judgment appealed from by the Singer Sewing Machine Company. We must look to the whole instrument to gather the intention of the parties, the preamble as well as the condition of the bond, and particularly is this true where there is doubt. The condition of the bond is even more explicit than the preamble in limiting liability on the bond to a stay of execution against the Singer Sewing Machine Company. It is as follows:

"Now, therefore, the undersigned American Surety Company, a corporation authorized to, and doing business in the State of Idaho, in consideration of the premises and of such appeal on the part of said appellant, Singer Sewing Machine Company, a corporation, does hereby acknowledge itself firmly bound in the sum of Twenty-five Thousand ($25,000.00) Dollars, gold coin of the United States, that if the said judgment appealed from, or any part thereof, be affirmed, or the appeal dismissed, the appellant will pay in gold coin of the United States of America, the amount directed to be paid as to which said judgment shall be affirmed, if affirmed only in part, and all damages and costs which may be awarded against the appellant upon the appeal, and that if the said appellant does not make such payment within thirty days from the filing of the remittitur from the Supreme Court in the court from

which the appeal is taken, judgment may be entered on motion of respondents in their favor and against the undersigned surety for the sum of Nineteen Thousand Five Hundred Seventy-three and 70–100 ($19,573.70) Dollars, together with the interest that may be due thereon and the damages and costs which may be awarded against the said appellant, Singer Sewing Machine Company, upon the appeal."

It affirmatively appears from the condition of the bond as above set out that the bond was given solely for the purpose of staying execution against the Singer Sewing Machine Company, with the amount of the judgment payable only in the event the judgment against the Singer Sewing Machine Company or any part thereof be affirmed. If the judgment against the Sewing Machine Company had been affirmed in part the bond would be answerable to the extent of the affirmance.

The bond is unambiguous and clearly determines the liability of the surety. There is no room for construction and no justification for holding that the bond will be considered no further than to examine it in aid of determining the sole question of the trial court's jurisdiction to enter judgment on the bond. Even under such a technical view there is ample justification for holding that the judgment entered on the supersedeas bond was void. But the majority opinion actually construes the bond and its legal effect and holds that because the judgment was affirmed as to Anderson, it was affirmed in part and the surety is liable.

To recapitulate, we have this situation: The District Court had no jurisdiction over the Singer Sewing Machine Company after [77] the judgment against it had been set aside in this court. The rule is that when an order is entered in an appellate court reversing a judgment it is forthwith vacated and no longer remains in existence. 2 R. C. L., p. 270, sec. 222. When the judgment was set aside as to the Sewing Machine Company, the American Surety Company could not be liable because its principal had been dismissed. 1 Freeman on Judgments, 5th ed., p. 1026, sec. 466; Howell vs. Alma Milling Co., 36 Neb. 80, 38 A. S. R. 694, notes, pp. 702–712; First Nat. Bank vs. Rogers, 13 Minn. 407, 97 Am. Dec. 239; Burnham vs. Edwards, (Okl.) 257 Pac. 788. The bond upon its face, in unmistakable language, shows that it was given to stay execution against the Singer Sewing Machine Company and for no one else, and the court therefore had no authority to construe the bond to include the judgment against Anderson. The judgment against the Surety Company on the supersedeas bond was therefore void when entered, and was subject to attack by motion to, and was properly, set aside.

No other result can follow from the holding of the majority than a miscarriage of justice, and it is repugnant to both the state and federal Constitutions in that the surety company is deprived of its property without due process of law. [78]

[Title of Court and Cause—No. 5653.]

CERTIFICATE OF CLERK OF SUPREME COURT TO OPINION.

I, Clay Koelsch, Clerk of the Supreme Court of the State of Idaho, do hereby certify that the above and foregoing is a true and correct copy of the original opinion filed in the above-entitled cause on the second day of May, 1931, and now on file in my office.

WITNESS my hand and the seal of the court this seventh day of July, 1931.

[Seal] CLAY KOELSCH,
Clerk.
By Edith J. Hearne,
Deputy. [79]

11,860. Filed June 3d 1931. Stephen Utter, Clerk. By Otto F. Peterson, Deputy.

[Title of Court and Cause—No. 5653.]

This cause having been heretofore heard and taken under advisement by the Court, and the Court having fully considered the same, on this day the decision of the Court is delivered by Justice McNaughton, to the effect that the order of the District Court of the Third Judicial District for Ada County vacating the judgment be and the same is hereby reversed, with costs to appellants, in the sum of $96.

I, Clay Koelsch, Clerk of the Supreme Court of the State of Idaho, do hereby certify that the

above and foregoing is a true and correct copy of the original judgment entered in the above-entitled cause on the second day of May, 1931, and now of record in my office.

WITNESS my hand and the seal of the court this seventh day of July, 1931.

[Seal] CLAY KOELSCH,
Clerk.
By Edith J. Hearne,
Deputy.

CERTIFICATE.

State of Idaho,
County of Ada,—ss.

I, Stephen Utter, Clerk of the District Court of the Third Judicial District of the State of Idaho, in and for the county of Ada, do hereby certify that the foregoing is a true and correct copy of the original remittitur from the Supreme Court of Idaho, filed in this court on June 3d, 1931, filed in the above-entitled action and remaining now on file in my office at Boise City, Ada County, Idaho.

Given under my hand and the seal of said court, at office in Boise City, Ada County, Idaho, this 21st day of July, 1931.

[Seal] STEPHEN UTTER,
Clerk.
By Otto F. Peterson,
Deputy. [80]

## DEFENDANTS' SHOWING No. 4.

No. 11,860.

Filed Jun. 8, 1931. Stephen Utter, Clerk. By Thos. E. Powell, Deputy.

U. S. District Court, District of Idaho. Filed Jul. 22, 1931. W. D. McReynolds, Clerk. By ————, Deputy.

In the District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada.

VIVIAN F. BALDWIN and E. R. BALDWIN,
Plaintiffs,

vs.

ED ANDERSON and AMERICAN SURETY COMPANY OF NEW YORK, a Corporation,
Defendants.

## NOTICE OF MOTION.

To the Above-named Plaintiffs and to James F. Ailshie, Jr., and J. R. Smead, Their Attorneys:

YOU, AND EACH OF YOU, ARE HEREBY NOTIFIED, That on the 20th day of June, 1931, at 10 o'clock A. M. of said day, or as soon thereafter as counsel can be heard, at the courtroom of the above-entitled court, at Boise, Idaho, the above-named defendant, American Surety Company of New York, will, by its counsel, move the Court to

correct and amend that certain judgment against said American Surety Company of New York, made and entered on the 23d day of June, 1930, and when so amended to vacate and set aside said judgment upon the grounds and in accordance with the motion filed herewith, a copy of which is herewith served upon you.

Said motion is based upon the records and files in this action, the private files of the Judge of this court who made said judgment at Chambers, the minutes and proceedings of the above-entitled court, the exhibits attached to said motion and made a part thereof, being the affidavits of Frank Martin, McKeen F. Morrow, Thos. L. Powell, A. J. Gamble, Howard E. Stein and B. Clyde Eagleson, and the certified copy of minutes attached to the last-mentioned affidavit as an exhibit.

Dated, June 18th, 1931.

RICHARDS & HAGA,
MARTIN & MARTIN,
Attorneys for American Surety Company of New York, Surety.

Service of the foregoing notice of motion and of the motion therein referred to, and the exhibits thereto attached, as listed above, and receipt of a copy of each of said papers is hereby admitted this 18th day of June, 1931.

JAMES F. AILSHIE, Jr.,
J. R. SMEAD,
Attorneys for Plaintiffs. [81]

Filed June 18, 1931. Stephen Utter, Clerk. By Thos. E. Powell, Deputy.

[Title of Court and Cause—No. 11,860.]

MOTION TO AMEND JUDGMENT.

Comes now the American Surety Company of New York, a New York corporation, and moves this Honorable Court as follows, to wit:

I.

To correct and amend that certain judgment against said American Surety Company of New York, purporting to have been made and entered in the above-entitled cause by the above-entitled court on the 23d day of June, 1930, but in truth and in fact, made at Chambers by the Judge of said court, in the matters hereinafter stated, to wit:

(a) Strike from said judgment the following words, to wit:

> "and the plaintiffs having moved the court for a judgment against the said American Surety Company of New York, a corporation, and the court being fully advised in the premises:"

for the reason that said statement is misleading and false and not in accordance with the facts, as no motion was made by or on behalf of the plaintiffs to the above-entitled court in said matter either orally or in writing and no motion was made or [82] filed in or with said court by the plaintiffs or their counsel in connection with said matter.

That said judgment was prepared by plaintiffs'

counsel and presented to the Judge of said above-entitled court at Chambers without motion and the Judge of said court signed said judgment at Chambers upon request of the plaintiffs' said attorneys inadvertently and without noticing or having his attention called to said above false and misleading statements.

(b) To strike from the last line in said judgment the following words, to wit:

"in open court"

and insert in lieu thereof the words—"at chambers" —for the reasons given in paragraph (a) above.

II.

That when said judgment is so amended and corrected as above set forth so that it will show the truth in regard to the manner of its making and entry that the same be vacated and set aside upon the following grounds and for the following reasons, to wit:

(a) That the Judge of said court had no jurisdiction to make and enter said judgment at Chambers, it being a matter requiring judicial consideration and one that could only be heard, and judgment made and entered by the court and not by the Judge of said court at Chambers.

(b) That no notice of said Chambers proceeding was given to the American Surety Company as required by law.

That neither the American Surety Company and/or its attorneys had any notice or knowledge that said judgment was made and entered without motion

having been made therefor before the court and had no notice or knowledge that said judgment was made at Chambers by the Judge of said court and not [83] by the court. That the said American Surety Company of New York, and its attorneys believed and relied upon the truth of the statements contained in said judgment that the said motion for said judgment was made in court, and that the said judgment was made and entered in the court, and so relying upon said statements as true did not make an investigation of said matter and were thereby misled to their injury and were prevented thereby from including said matters in their motion previously made to vacate said judgment and the appeal from the order of this court vacating said judgment heretofore made in the Supreme Court of this state. That neither the American Surety Company of New York, or its said attorneys or either of them had any notice or knowledge that said statements in said judgment were false until after the decision of the Supreme Court in this matter on appeal from the former order of this court vacating said judgment of June 23d, 1930, and until some time about June 1, 1931.

This motion is based upon the records and files in this action, the private files of the Judge of this court who made said judgment at Chambers, the minutes and proceedings of the above-entitled court, the exhibits attached hereto and made a part hereof, and a statement of the Hon. Charles F. Koelsch, the Judge who made said judgment at

Chambers, to be taken on the hearing of this motion and made a part of said proceedings.

RICHARDS & HAGA,
MARTIN & MARTIN,

Attorneys for American Surety Company of New York, Surety. [84]

EXHIBIT "A."

In the District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada.

VIVIAN F. BALDWIN and E. R. BALDWIN,
Plaintiffs,

vs.

ED. ANDERSON and THE AMERICAN SURETY COMPANY OF NEW YORK, a Corporation, Surety.

AFFIDAVIT OF FRANK MARTIN.

State of Idaho,
County of Ada,—ss.

Frank Martin, being first duly sworn, deposes and says:

That he is a member of the firm of Martin & Martin, attorneys at law of Boise, Idaho, and has been a member of such firm during all the times hereinafter mentioned in this affidavit.

That the firm of Martin & Martin were attorneys for and represented the defendant Singer Sewing Machine Company in the action of Vivian F. Baldwin and E. R. Baldwin vs. the Singer Sewing Ma-

chine Company, a corporation and Ed. Anderson, in that suit in the District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada, and on the appeal of the same to the Supreme Court of the State of Idaho, mentioned and described in the judgment made in favor of the plaintiffs Vivian F. Baldwin and E. R. Baldwin and against the American Surety Company of New York, in said matter on the 23d day of June, 1930, by the Hon. Charles F. Koelsch, District Judge.

That the first information that this affiant or any member of the firm of Martin & Martin had that said judgment of June 23d, 1930, against the American Surety Company of New York had been made, or any proceeding therefor, was late on the afternoon [85] of June 24th, 1930, when Mr. McKeen F. Morrow of the firm of Richards & Haga, local attorneys of said American Surety Company of New York informed this affiant that James F. Ailshie, Jr., one of the attorneys for the plaintiffs, had informed him of the entry of said judgment and delivered to him a copy of the same.

That thereafter the firm of Martin & Martin assisted the local attorneys of the American Surety Company of New York, Messrs. Richards & Haga, in presenting a motion to the above-entitled court for the cancellation and vacation of said judgment so entered and also assisted said attorneys, Richards & Haga in the matter of the appeal of the plaintiffs herein from the order of the District Court vacating and setting aside the said judgment so entered against the American Surety Company of New York.

That at all times this affiant and the firm of Martin & Martin in assisting in said matter believed and relied upon the statements made in the said judgment so entered against the American Surety Company of New York as hereinabove stated, that the same was presented to the above-entitled court by motion and that said proceedings were had and said judgement made and entered in open court, and so relying upon said statements in said judgment as being true, made no investigation of said matter. That this affiant and the members of the firm of Martin & Martin had no notice of any matter and nothing was called to their attention which in any way caused them to suspicion or doubt that said statements in said judgment were true and as therein contained, and at all times in working on said matter assisting the said local attorneys of said American Surety Company of New York, and being in close touch with the said attorneys, this affiant knows that in all of said work the said firm of Richards & Haga, local attorneys for the American Surety Company, also fully [86] relied upon, and their actions were governed by such reliance upon the truth of the said statements in said judgment.

That so relying upon the truth of said statements contained in said judgment, the said American Surety Company of New York and the said attorneys representing it in said matters as hereinabove stated, were misled and prevented from presenting said matter on the motion heretofore made and herein referred to causing said judgment to be

acated and set aside and on the appeal therefrom o the Supreme Court of the State of Idaho.

That in working upon a petition for rehearing after the Supreme Court of this state had rendered its decision on the appeal of the plaintiffs from the order vacating said judgment, on or about May 20th, 1931, and noticing in said decision that the Court emphasised the statement in the said judgment that the same had been entered on motion of the plaintiffs to the District Court, this affiant for that reason desired to see the contents of said motion, and caused Frank Martin, Jr., a member of the firm of Martin & Martin, to go to the office of the Clerk of said District Court and examine the files, directing him to secure the contents of such motion. That on the return of said Frank Martin, Jr., from the office of the Clerk of said court, he informed this affiant that the files did not contain any such motion and that the Register of Actions in said case contained no notice that such motion had been filed in said case. That within a day or so after receiving this information affiant communicated the same to McKeen F. Morrow of the firm of Richards & Haga. This was the first notice or information of any kind that this affiant, or any member of the firm of Martin & Martin had that no motion for judgment in said matter had been made to the court and filed in said matter.

That thereafter and on or about the 4th day of June, 1931, this affiant, in company with McKeen F. Morrow of the firm of [87] Richards & Haga, called upon the Hon. Charles F. Koelsch, the Judge

of the above entitled court who had signed said judgment against the American Surety Company of New York hereinbefore referred to, and asked the said Judge about said motion and the manner of its making in court, whether or not such motion had been made orally in court or whether a written motion had been presented. Thereupon, the said Judge, Hon. Charles F. Koelsch, stated in substance to this affiant and the said McKeen F. Morrow, that said matter had not been done in court, that counsel for plaintiffs had presented the matter to him at chambers by presenting a prepared judgment against the said American Surety Company of New York, and requesting that he sign and enter the same. That said judgment had been so presented to him two or three days prior to June 23rd, 1930. That he then inquired of counsel for the plaintiffs who presented said judgment, James F. Ailshie, Jr., whether or not notice had been given to the American Surety Company of New *U*ork, and was informed by said attorney that no such notice had been given and that notice was unnecessary and at said time presented to said Judge authorities on said point. That on June 23rd, 1930, said counsel for plaintiffs again returned to the chambers of said Judge and again called the matter to his attention. That thereupon the said Judge signed said judgement and at the same time stated to said attorney for the plaintiffs that he would sign said judgment as he assumed the American Surety Company of New York would take appropriate steps to bring the matter before the

court for further consideration, further stating in substance that said entire proceeding was more or less a *pro forma* matter and that the entire matter was conducted at the chambers as a chambers proceedings. [88]

That this conversation with Judge Charles F. Koelsch was the first notice or information which this affiant or any member of the firm of Martin & Martin had that said proceedings was held at chambers and said judgement made and entered at chambers, and not in court as stated in said judgement, and in all proceedings taken before that time the said law firm of Richards & Haga and the said firm of Martin & Martin in their representation of the American Surety Company of New York, had fully relied upon the statements contained in said judgment that it was made and entered in open court and that the motion therefor was made to the court, and had believed such statements to be true.

That after this conversation with the said Hon. Charles F. Koelsch, this affiant made a careful examination of the proceedings of the court as shown by the District Court Journal kept by the Clerk of said court for the period from June 20th, 1930, to June 25th, 1930, both dates inclusive, and found thereon no reference whatever in said District Court Journal to the above entitled cause.

That this affidavit is made in support of the motion of the American Surety Company of New York to amend said judgment to show the true

facts in regard to its making and entry and to have the same vacated and set aside.

FRANK MARTIN.

Subscribed and sworn to before me this 17th day of June, 1931.

[Seal] C. S. HUNTER,
Notary Public.
Residence: Boise, Idaho. [89]

EXHIBIT "B."

In the District Court of the Third Judicial District of the State of Idaho, in and for Ada County.

VIVIAN F. BALDWIN and E. R. BALDWIN,
Plaintiffs,

vs.

ED ANDERSON and AMERICAN SURETY COMPANY OF NEW YORK,
Defendants.

AFFIDAVIT OF McKEEN F. MORROW.

State of Idaho,
County of Ada,—ss.

McKeen F. Morrow, being first duly sworn, upon his oath, deposes and says:

That he is a member of the firm of Richards & Haga, attorneys at law, Boise, Idaho, and said firm are local attorneys in Ada County and vicinity for American Surety Company of New York; that affiant and O. O. Haga and J. L. Eberle are author-

ized countersignors on surety bonds for said American Surety Company of New York.

That no notice whatever was given to said firm of Richards & Haga, or any member thereof, of the application of the above named plaintiffs for judgment against said American Surety Company of New York upon the supersedeas bond filed herein prior to the signing and entry of said judgment, and the first information affiant or said firm of Richards & Haga had regarding said judgment was on the 24th day of June, 1930, when one of the attorneys for plaintiffs informed affiant that judgment had been entered against the Surety Company on June 23d and gave affiant a copy of said judgment; that affiant thereafter made inquiries from the local agents of the American Surety Company, the Commissioner of Insurance of the State of Idaho, the District Office of the Surety [90] Company in Salt Lake City, Utah, and the New York office of said Company, and also examined the Court files; that there is no proof of notice of any kind in the court files and in answer to said inquiries, affiant was informed that no notice of application for judgment was given to any of the parties above named.

That the opinion of the Supreme Court on the appeal from order vacating judgment herein placed some emphasis upon plaintiffs' alleged motion for judgment on the undertaking herein and while the petition for rehearing was being prepared affiant discussed the necessity of a formal motion with associate counsel; that affiant knew that the record

on appeal from said order did not include any motion for judgment, but affiant relied upon the recital in said judgment that plaintiffs had moved the Court for judgment; that shortly before the 22nd day of May, 1931, affiant was informed by Mr. Frank Martin, of the firm of Martin and Martin, that the register of actions in this cause did not show the filing of any motion for judgment, and this was the first notice or information obtained by affiant or the firm of Richards & Haga that no motion for judgment in said matter had been filed by plaintiffs.

That about the 4th or 5th day of June, 1931, affiant and Frank Martin, Esq., of the firm of Martin & Martin, called on the Hon. Charles F. Koelsch, one of the Judges of the above entitled Court and the Judge who signed the judgment against American Surety Company of New York herein, and inquired about the existence of a formal motion to the Court and whether or not said judgment was entered in Open Court; that the Hon. Charles F. Koelsch then stated in effect to affiant and Mr. Martin that counsel for plaintiffs had presented to him at Chambers a form of judgment and requested the entry of judgment against American Surety Company of New York a day or two prior to June 23, 1930; that said Judge inquired about notice and counsel informed him that notice was unnecessary and presented authorities on that [91] point; that on June 23d counsel for plaintiffs again brought up the matter and the said Judge thereupon signed the judgment; that said request for

judgment was made to the Judge at Chambers and the entire proceedings were had at Chambers; that said Hon. Charles F. Koelsch further stated in effect that he told counsel for plaintiffs that he was signing the judgment largely as a *pro forma* matter and that he assumed defendant would take appropriate steps to bring the matter before the Court for further consideration; that this conversation with Judge Koelsch was the first notice or information which affiant or the firm of Richards & Haga had that said judgment was entered at Chambers and not in Open Court as stated in said judgment, and until said conversation affiant had relied upon the truth of the statement in said judgment that it was done in open court.

That after said conversation with the said Hon. Charles F. Koelsch, affiant made a careful examination of the register of actions in the above entitled cause and of the original files in said cause in the office of the Clerk and found that there was no motion for judgment and no written application of any sort for judgment against American Surety Company of New York on file in said cause and that there was no record of the same in the register of actions nor in the memorandum of papers endorsed on the file cover enclosing the files in said cause; that thereafter affiant also examined the District Court Journal for the period from June 20 to June 30, 1930, both dates inclusive, and found no reference whatever in said District Court Journal to the above entitled cause, except that on or about the date last mentioned there is a record

of the argument and submission of the motion of defendant American Surety Company to vacate the judgment entered against it in the above entitled cause.

McKEEN F. MORROW.

Subscribed and sworn to before me this 17th day of June, 1931.

[Seal] H. M. JEFFREY,
Notary Public for Idaho.
Residence: Boise, Idaho. [92]

## EXHIBIT "C."

In the District Court of the Third Judicial District of the State of Idaho, in and for Ada County.

VIVIAN F. BALDWIN and E. R. BALDWIN,
Plaintiffs,

vs.

ED ANDERSON and AMERICAN SURETY COMPANY OF NEW YORK,
Defendants.

## AFFIDAVIT OF A. J. GAMBLE.

State of Idaho,
County of Ada,—ss.

A. J. Gamble, being first duly sworn, upon his oath, deposes and says:

That he is Managing Director of Boise Trust Company, a corporation; that said Boise Trust Company is local agent for American Surety Company of New York in Ada County and was such

local agent in June, 1930, and affiant and Marie Baker, an employee of said Boise Trust Company, are authorized to execute surety bonds on behalf of said American Surety Company of New York;

That no notice whatever was given to said Boise Trust Company, or any of its officers, agents or employees, of any motion or application for judgment against American Surety Company of New York in the above entitled cause, and the first information said Boise Trust Company or this affiant had of the entry of said judgment was after said judgment had been signed and entered and execution issued thereon.

Further, affiant sa*ye*th not.

A. J. GAMBLE.

Subscribed and sworn to before me this 17th day of June, 1931.

[Seal] MARIE L. BAKER,
Notary Public for Idaho.
Residence: Boise, Idaho. [93]

EXHIBIT "D."

In the District Court of the Third Judicial District of the State of Idaho, in and for Ada County.

VIVIAN F. BALDWIN and E. R. BALDWIN,
Plaintiffs,

vs.

ED ANDERSON and AMERICAN SURETY COMPANY OF NEW YORK, a Corporation,
Defendants.

## AFFIDAVIT OF HOWARD E. STEIN.

State of Idaho,
County of Ada,—ss.

Howard E. Stein, being first duly sworn, upon his oath deposes and says:

That in June, 1930, he was a member of the firm of Stein-Lake Company, the other member being Archie W. Lake. That during June, 1930, affiant and the said Archie W. Lake were local agents for American Surety Company of New York and held Power of Attorney from said Company to execute certain bonds and undertakings on behalf of said Company; that affiant had charge of the bond business for said Stein-Lake Company.

That no notice whatever was given to affiant or said Archie W. Lake, or to any of their employees, of any motion or application for judgment against American Surety Company of New York in the above entitled cause, and affiant was first informed that judgment had been taken against said American Surety Company of New York in the above entitled cause by Messrs. Richards & Haga, of Boise, Idaho, after said judgment had been signed and entered.

Further affiant sayeth not.

HOWARD E. STEIN.

Subscribed and sworn to before me this 17th day of June, 1931.

[Seal] L. M. HIGGINS,
Notary Public.
Residence: Boise, Idaho. [94]

## EXHIBIT "E."

In the District Court of the Third Judicial District of the State of Idaho, in and for Ada County.

VIVIAN F. BALDWIN and E. R. BALDWIN,
Plaintiffs,

vs.

ED ANDERSON and AMERICAN SURETY COMPANY OF NEW YORK, a Corporation,
Defendants.

## AFFIDAVIT OF THOS. E. POWELL.

State of Idaho,
County of Ada,—ss.

Thos. E. Powell, being first duly sworn, upon his oath deposes and says:

That he is a Deputy Clerk of the above entitled Court and his duties are those of Court Room Clerk, the other Court Room Clerk being B. Clyde Eagleson. That it is part of his duties as such Court Room Clerk to transcribe from the longhand notes of Deputy Clerk B. Clyde Eagleson the minute Entries for the District Court journal of all Court proceedings in the Court which said Deputy Clerk B. Clyde Eagleson attends; that he transcribed from the longhand notes of said B. Clyde Eagleson the minutes of Court proceedings had before Judge Koelsch on June 23, 1930, and placed them in the District Court journal, and the said longhand notes were thereupon destroyed. That

Exhibit "X," attached to the affidavit of B. Clyde Eagleson, being a certified copy of the minutes of proceedings before the Court presided over by the Honorable Charles F. Koelsch, as District Judge, contains all the Court proceedings had on June 23, 1930, before said Court which were shown by the longhand notes of said B. Clyde Eagleson delivered to affiant for the purpose of transcription, as aforesaid. Affiant further says that he transcribed from similar notes taken either by himself or by the said B. Clyde Eagleson all court proceedings had or taken in the Court presided over by the Honorable Charles F. Koelsch, as District Judge, during the period from June 20, 1930, to June 24, 1930, both dates inclusive, and that the same are correctly transcribed in the District Court journal covering said period and that there is no reference in said District Court journal for the period from June 20, 1930, to June 24, 1930, both dates inclusive, to any proceedings had or taken in Court in the above entitled cause.

Further affiant sa*y*eth not.

THOS. E. POWELL.

Subscribed and sworn to before me this 17th day of June, 1931.

(Seal of District Court.)

STEPHEN UTTER,
Clerk.

By B. Clyde Eagleson,
Deputy Clerk. [95]

EXHIBIT "F."

In the District Court of the Third Judicial District of the State of Idaho, in and for Ada County.

VIVIAN F. BALDWIN and E. R. BALDWIN,
Plaintiffs,

vs.

ED ANDERSON and AMERICAN SURETY COMPANY OF NEW YORK, a Corporation,
Defendants.

AFFIDAVIT OF B. CLYDE EAGLESON.

State of Idaho,
County of Ada,—ss.

B. Clyde Eagleson, being first duly sworn, upon his oath deposes and says: That he is a Deputy Clerk of the above entitled Court and his duties are those of a Court Room Clerk, the other Court Room Clerk being Thos. E. Powell. That it is part of his duties as such Court Room Clerk to write down minute entries for the District Court journal of all court proceedings in the particular court which he happens to be attending which are thereafter transcribed by the said Thos. E. Powell. That on June 23, 1930, affiant was Court Room Clerk in the Court of District Judge Charles F. Koelsch and distinctly recalls being present when certain proceedings mentioned in the District Court journal for that date were had; that he wrote down in longhand all Court proceedings had on June

23, 1930, before the Honorable Charles F. Koelsch, as District Judge, and turned them over to the said Thos. E. Powell, Deputy Clerk, for transcribing, and that there were no proceedings had in Open Court before the Honorable Charles F. Koelsch, as District Judge, on said June 23, 1930, other than those shown in Exhibit "X" attached to this affidavit and made a part hereof, the said exhibit being a certified copy of the minutes of court proceedings before the said Honorable Charles F. Koelsch as the same appear in District Court journal, Book "Y," Page 125.

That the proceedings with reference to the judgment in favor of Vivian F. Baldwin and E. R. Baldwin and against American Surety Company of New York in the above entitled cause were all had before the Honorable Charles F. Koelsch, District Judge, at Chambers, and if the same had been had in Open Court a minute thereof would appear in the District Court journal; that affiant has examined the District Court journal from June 20, 1930, to June 24, 1930, both dates inclusive, and there is no reference therein to the above entitled cause or to the judgment entered in said cause against American Surety Company of New York, and affiant further says he has examined the Register of Actions in said cause and the same does not show the filing of any motion for judgment herein, and that he has also examined the original files in said cause and that no motion for judgment in favor of the above named plaintiffs and against American Surety Company of New York, a cor-

poration, appears in said files. Further affiant sayeth not.

B. CLYDE EAGLESON.

Subscribed and sworn to before me this 17th day of June, 1931.

(Seal of District Court)

STEPHEN UTTER,
Clerk.
By Thos. E. Powell,
Deputy. [96]

EXHIBIT "X."

Journal Y, District Court, Ada County, Idaho.

Boise, Idaho, June 23d, 1930.

One hundred and sixtieth judicial day of the District Court of the Third Judicial District of the State of Idaho, in and for the county of Ada. Present, Hon. DANA E. BRINCK and Hon. CHAS. F. KOELSCH, District Judges, and the officers of the court.

After the reading and approval of the minutes of June 21st, 1930, the following proceedings were had before Hon. Dana E. Brinck, to wit:

. . . . . .

Whereupon the following proceedings were had before Hon. Chas. F. Koelsch, to wit:

No. 12,643.

DUFRESNE AUTOMOBILE CO.

vs.

T. A. HAMILTON.

In this cause, the defendant's petition for a rehearing was argued before the Court by counsel for respective parties and taken under advisement.

No. 12,861.

PETER NIELSON

vs.

M. F. STEWART et al.

In this cause, the demurrers and motions were argued before the court by counsel for respective parties and taken under advisement, counsel for respective parties to file briefs within five days.

CRIM. No. 328.

STATE OF IDAHO

vs.

CLYDE PULLIAM, True Name TED PULLIAM.

The Prosecuting Attorney with the defendant came into court, the defendant to be arraigned upon the information filed against him charging him with the crime of driving a motor while under the influence of intoxicating liquor. [97]

The defendant stated in answer to the Court that the name by which he had been informed against was his true name and that he had no counsel and did not want counsel to represent him herein.

The Clerk, under the direction of the Court, read the information herein to the defendant and furnisher him with a true copy thereof, together with all indorsements thereon.

The defendant waived the statutory time to plead and also the time allowed by the Court, and desired to plead forthwith, which was granted by the Court.

The Court asked the defendant if he pleaded "Guilty" or "Not Guilty" as charged, and thereupon the defendant pleaded that he is "Not Guilty" as charged in the information.

Whereupon the Court ordered that this court *fo* now adjourn until 10 A. M. June 24th, 1930.

CHAS. F. KOELSCH,
District Judge.

State of Idaho,
County of Ada,—ss.

CERTIFICATE.

I, Stephen Utter, Clerk of the District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada, do hereby certify that the foregoing is a true and correct copy of the original page of Journal Y records of the Third Judicial District of the State of Idaho, in and for Ada County, for the date June 23d, 1930, relative to the cases which came before Judge Chas. F. Koelsch.

Given under my hand and the seal of said Court, at office in Boise City, Ada County, Idaho, this 16 day of June, 1931.

(Seal of District Court)

STEPHEN UTTER,
Clerk.
By Frances Wood,
Deputy. [98]

[Title of Court and Cause.]

NOTICE OF LEVY OF WRIT OF EXECUTION.

To American Surety Company of New York:

You are hereby notified that pursuant to the writ of execution issued in the above-entitled cause and out of the above-entitled court, a true copy of which writ of execution is hereunto attached and by this reference thereto specifically made a part hereof, the sheriff of Ada County, State of Idaho, has levied upon, and by virtue of such levy has taken into his possession, those certain bonds deposited by you with the state treasurer of the State of Idaho pursuant to the provisions of Section 5104 of the Idaho Compiled Statutes, which bonds are more particularly described as follows, to wit:

United States Fourth Liberty Loan Bonds,
4¼%, Numbers 559144 to 559148, 5
bonds at $1,000 each.....$5,000.00
Numbers 46289 and 46290, 2 bonds at $10,-
000 each .....20,000.00

And you are hereby further notified that on Wednesday the 5th day of August, 1931, at 10:00 o'clock A. M. of said day, at the front door of the county courthouse of Ada County, State of Idaho, which courthouse is situated in the city of Boise, Ada County, Idaho, the said sheriff will offer the aforesaid bonds for sale pursuant to said levy and in accordance with the laws of the State of Idaho, at public auction, and will sell the same to the

highest bidder, all as and in the manner prescribed [99] by the laws of the State of Idaho, to satisfy the judgment entered against American Surety Company of New York and in favor of Vivian F. Baldwin and E. R. Baldwin, the respective parties above named in the caption of this Notice, which judgment was entered in the above-entitled court and cause on the 23d day of June, 1930. The proceeds of said sale received by said sheriff will be paid by him to the above-named plaintiffs, judgment creditors herein, in payment of said judgment, and if, after said judgment shall be satisfied in full, any overplus of such proceeds shall remain in the hands of said sheriff, the same will be paid to you or as and to whomsoever you may order or direct.

WITNESS my hand this 19th day of June, 1931.

JOHN McGRATH,
Sheriff of Ada County, State of Idaho.
By James Brandon,
Deputy.

JAMES F. AILSHIE, Jr.,
J. R. SMEAD,
Attorneys for Vivian F. Baldwin and E. R. Baldwin, Plaintiffs Above Named and Judgment Creditors Herein. [100]

In the District Court of the Third Judicial District of the State of Idaho, in and for Ada County.

VIVIAN F. BALDWIN and E. R. BALDWIN,
Plaintiffs,

vs.

ED ANDERSON and THE AMERICAN SURETY COMPANY OF NEW YORK, a Corporation,
Defendants.

EXECUTION—GENERAL.

The People of the State of Idaho to the Sheriff of the County of Ada, GREETING:

Whereas, on the 23d day of June, A. D. 1930, Vivian F. Baldwin and E. R. Baldwin recovered a judgment in the said District Court of the Third Judicial District, of the State of Idaho, in and for the county of Ada, against The American Surety Company of New York, a corporation, for the sum of Twenty-two Thousand Three Hundred Fifty-seven and 21/100 Dollars, together with costs in the sum of $96.00 awarded by the Supreme Court of Idaho against said defendant by its remittitur dated June 2, 1931, with interest thereon at the rate of seven per cent per annum until paid, as appears to us of record.

AND WHEREAS, the judgment-roll in the action in which said judgment was entered, is filed in the Clerk's office of said court, in the county of Ada, and the said judgment was docketed in said

Clerk's office, in the said county, on the day and year first above written. And the sum of $22,-357.21, with interest from June 23, 1930, and $96.00 costs, together with interest at the rate of 7% per annum thereon from June 2, 1931, is now, at the date of this writ, actually due on said judgment.

NOW, you, the said sheriff, are hereby required to satisfy said judgment, with interest as aforesaid, out of the said personal property of said American Surety Company of New York, a corporation, or if sufficient personal property of said debtor cannot be found, then out of the real property in your county belonging to said debtor on the day whereon said judgment was docketed in said Ada County, or at any time thereafter, and make return of this writ within sixty days after the receipt hereof, with what you have done endorsed thereon.

WITNESS, Hon. CHAS. F. KOELSCH, Judge of the said Third Judicial District of the State of Idaho, in and for the county of Ada, this 17th day of June, A. D. 1931.

ATTEST my hand and the seal of said court, the day and year last above written.

[Seal of District Court]

STEPHEN UTTER,
Clerk.
By Otto G. Peterson,
Deputy Clerk. [101]

NOTICE OF SHERIFF'S SALE.

By virtue of an execution in my hands, issued out of the District Court of the Third Judicial District of the State of Idaho, in and for the county of Ada, in the suit of Vivian F. Baldwin and E. R. Baldwin, plaintiffs, against Ed Anderson and the American Surety Company of New York, a Corporation, defendants, duly attested the 17th day of June, A. D. 1931, I have levied upon all the right, title and interest of the said American Surety Company of New York, a corporation, in and to the following described property, situated in Ada County, Idaho, viz.:

Those certain bonds deposited by the American Surety Company of New York, a corporation, with the state treasurer of the State of Idaho pursuant to the laws of the State of Idaho, and particularly Section 5104 of the Idaho Compiled Statutes, which bonds are more particularly described as follows, to wit:

United States Fourth Liberty Loan Bonds, 4¼%, Numbers 559144 to 559148, 5 bonds at $1,000 each ..... $ 5,000.00

Numbers 46289 and 46290, 2 bonds at $10,000 each ..... 20,000.00

NOW, THEREFORE, pursuant to the laws of the State of Idaho, in such case made and provided, and with particular reference to Section 5104, Idaho Compiled Statutes of 1919.

NOTICE IS HEREBY GIVEN, that on Wednesday, the 5th day of August, A. D. 1931, at 10:00

o'clock A. M. of said day, at the front door of the county courthouse of Ada County, State of Idaho, in the city of Boise, Ada County, Idaho, I will sell all the right, title and interest of the said American Surety Company of New York, in and to the said above-described property, at public auction, to the highest bidder for cash in lawful money of the United States, to satisfy said execution and all costs.

Given under my hand, this 25th day of June, A. D. 1931.

_____,

Sheriff.

By _____,

Deputy Sheriff. [102]

Filed June 30, 1931. Stephen Utter, Clerk. By B. Clyde Eagleson, Deputy.

[Title of Court and Cause.—No. 11,860.]

CERTIFICATE AND AFFIDAVITS.

Come now the plaintiffs, and without waiving their objections to motion of defendant American Surety Company of New York to amend and vacate the judgment of June 23, 1930, herein, enter as a part of the records and files in this action the following:

Certificate of Hon. Charles F. Koelsch, one of the Judges of the District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada, who presided as such in open court on the 23d day of June, 1930.

Affidavit of James F. Ailshie, Jr.

Affidavit of J. R. Smead.

The minutes and records of this Court showing the terms of District Court in Ada County for the years 1930 and 1931, respectively, which are hereby specifically referred to and made a part hereof.

Dated this 30th day of June, 1931.

JAMES F. AILSHIE, Jr.,
J. R. SMEAD,
Attorneys for Plaintiffs. [103]

[Title of Court and Cause.]

AFFIDAVIT OF JAMES F. AILSHIE, Jr.

State of Idaho,
County of Ada,—ss.

James F. Ailshie, Jr., being first duly sworn, on oath deposes and says:

That at all times hereinafter mentioned I have been, and now am, a member of the Idaho Bar, and as such have been one of the attorneys of record for plaintiffs in the case of Vivian F. Baldwin and E. R. Baldwin, Plaintiffs, vs. Singer Sewing Machine Company and Ed Anderson, Defendants, complaint in which was filed in the District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada, on or about March 1, 1928; that I have participated in all proceedings including the proceedings had in the District Court for Ada County on the 23d day of June, 1930.

That J. R. Smead, a member of the Idaho Bar, has at all times since the filing of the complaint

on March 1, 1928, been one of the attorneys of record for plaintiffs in said cause.

That prior to the 23d day of June, 1930, I had discussed and consulted with said Smead relative to moving for judgment against the American Surety Company in the event the [104] said judgment was not paid within thirty days after the filing of the remittitur of the Supreme Court, which said remittitur was filed on the 22d day of May, 1930; that we carefully computed the time and discussed the form of the motion, judgment, etc., and examined authorities bearing thereon; that on the morning of June 23, 1930, I telephoned said Smead and inquired of him if he desired to appear in court with me, to which the said Smead replied that he was otherwise engaged and deemed it unnecessary; that I thereupon went to the county courthouse at Boise, Idaho, where I found Judge Koelsch presiding in the south courtroom, and at that time a matter was being presented to him.

That after waiting for some time the matter then before the Court was closed, at or about 11:00 o'clock, whereupon I stepped to the Bench, court being still in session, and made a motion for judgment in favor of Vivian F. Baldwin and E. R. Baldwin and against the American Surety Company of New York, a corporation, upon its supersedeas undertaking filed in the case of Vivian F. Baldwin and E. R. Baldwin, Plaintiffs, vs. Singer Sewing Machine Company, a Corporation, and Ed Anderson, Defendants, and thereupon submitted a

form of judgment together with the complete records and files in said cause, including the opinion of the Supreme Court of the State of Idaho in said case dated April 10, 1930, and the remittitur issued pursuant thereto and filed in the District Court on the 22d day of May, 1930, also the undertaking of the American Surety Company referred to in the opinion of the Supreme Court of the State of Idaho dated May 2, 1931, in Baldwin vs. American Surety Company; that Judge Koelsch thereupon asked me if notice had been given the American Surety Company, to which I replied that no notice was necessary, and Judge Koelsch then requested that I furnish him authorities in connection with the matter; that I thereupon handed to him a copy [105] of the printed transcript in the case of U. S. Fidelity and Guaranty Company vs. Fort Misery Highway District, reported in 22 Fed. (2d) 369, together with a printed copy of the opinion of District Judge Frank S. Dietrich in said cause, and a number of citations, among them 22 Fed. (2d) 369, and Wood vs. Orford, 57 Cal. 157; that Judge Koelsch thereupon stated that he would take the matter under advisement, as he desired to consider the motion and examine the authorities and form of judgment; that I thereupon left the courthouse, returning about mid-afternoon, at which time I met Judge Dana E. Brinck, then one of the Judges of the District Court of the Third Judicial District of the State of Idaho, and went into his Chambers; that during the course of our conversation the matter then under advisement by

Judge Koelsch was discussed generally between us; that at about 3:30 o'clock P. M., or shortly thereafter, Judge Koelsch came into Judge Brinck's Chambers and indicated that he wished to talk to Judge Brinck, whereupon I left Judge Brinck's Chambers and stopped a few moments in the adjoining room talking with his court reporter, and then walked through a short hallway connecting Judge Brinck's Chambers with the north courtroom, the doors to which were open. That I had waited about said courtroom a short time when Judge Koelsch came into said north courtroom, the same being the room where the files, safe, and register of actions of said District Court are located; that at that time Judge Koelsch advised me that the motion had been granted, and he thereupon handed the judgment to the Clerk.

That the recitals as they appear in the judgment against the surety company entered on the 23d day of June, 1930, correctly state the facts as they occurred, and that said motion was granted and said judgment was signed after the Court had advised me that he would take the same under advisement, and that none of said proceedings were Chambers proceedings. [106]

JAMES F. AILSHIE, Jr.

Subscribed and sworn to before me this 20th day of June, 1931.

[Seal]

FERN B. JONES,
Notary Public for Idaho.
Residing at Boise, Idaho. [107]

[Title of Court and Cause.]

AFFIDAVIT OF J. R. SMEAD.

State of Idaho,
County of Ada,—ss.

J. R. Smead, being first duly sworn, deposes and says:

That he is an attorney at law duly licensed to practise such profession in the State of Idaho, and has been so practising, at Boise, Idaho, for more than twenty years; that he was one of the attorneys for plaintiffs in the case of Vivian F. Baldwin and E. R. Baldwin, Plaintiffs, vs. Singer Sewing Machine Company and Ed Anderson, Defendants, and was one of the attorneys in the case of the same plaintiffs vs. American Surety Company of New York; that after the remittitur of the Supreme Court in the case first mentioned above had been filed in the District Court of the Third Judicial District of the State of Idaho in and for the County of Ada, affiant and James F. Ailshie, Jr., who was also attorney for plaintiffs in both of said above-mentioned causes, consulted and discussed together, and collaborated, concerning a proceeding for judgment against said American Surety Company of New York on its supersedeas undertaking filed in the appeal of the said first-mentioned cause; that they together carefully calculated the time which must elapse before said proceeding could be taken, to wit, thirty days after the filing [108] of the aforesaid remittitur, and discovered that

June 21, 1930, would be the thirtieth day after such filing, excluding the date of such filing in the District Court as aforesaid, which date of filing said remittitur was May 22, 1930; that said 21st day of June fell on Saturday, and that affiant and said Ailshie therefore discovered that the first judicial day upon which such proceeding against said surety company on its undertaking could be had was Monday, June 23, 1930; that during all of said mentioned times affiant maintained his office in the First National Bank Building in Boise, and said Ailshie maintained his office in the Idaho Building in the same city; that on the morning of June 23, 1930, said Ailshie called affiant by telephone and advised him that he, the said Ailshie, was about to proceed to the District Court to present a motion for judgment on said supersedeas undertaking, and asked affiant if he wished to and could go with said Ailshie, to which affiant replied that he was otherwise occupied at that time, and that he believed it was unnecessary that more than one of counsel be present when such motion was presented; that at the close of that day, June 23d, said Ailshie again called affiant on the telephone and advised him that the motion for judgment on such undertaking had been granted, and such judgment had been entered against said surety company.

Referring to the affidavits on file herein in support of the motion to reform said judgment against said surety company, and particularly the statements contained in the affidavits of Frank Martin

and McKeen F. Morrow, affiant further states that when the appeal of said plaintiffs in their said case against said American Surety Company of New York was being perfected, and when the transcript on appeal was being prepared for filing in the Supreme Court of the State of Idaho in said cause, affiant and said James F. Ailshie, Jr., as attorneys for said plaintiffs, and the firms of Martin & Martin and Richards & Haga, together [109] with H. B. Walker, another practising attorney who appeared in said cause on appeal, executed a certificate concerning the contents of said transcript on appeal whereby they, and each of them, certified that said transcript on appeal contained "full, true and correct copies of the pleadings and proceedings" in said cause between said plaintiffs and American Surety Company of New York; and that said certificate became a part of, and now is a part of, the record on appeal in said cause, and appears of record in said cause in the Supreme Court of the State of Idaho.

That the said transcript on appeal, and the said copies of pleadings and proceedings therein, which copies were certified to be full, true, and correct copies of such pleadings and proceedings in said cause as above stated, contain and include no written motion for judgment against said Surety Company, and that the pleadings and proceedings and copies thereof submitted to said attorneys at the time they joined in such certificate contained and included no written motion for such judgment;

that said attorneys further stated in said certificate that they had "compared the foregoing transcript with the original papers," and affiant therefore states that the said law firms of Martin & Martin and Richards & Haga knew at the time of making said certificate, which was on the 5th day of September, 1930, and have known ever since, that no written motion for judgment was included in, or constituted any part of, the record of proceedings for a judgment against said surety company on its said supersedeas undertaking herein.

J. R. SMEAD.

Subscribed and sworn to before me this 30th day of June, 1931.

[Seal] FERN B. JONES,
Notary Public for Idaho.
Residing at Boise, Idaho. [110]

[Title of Court and Cause.]

## CERTIFICATE OF JUDGE OF DISTRICT COURT TO JUDGMENT.

I, Charles F. Koelsch, one of the Presiding Judges of the District Court of the Third Judicial District of the State of Idaho, do hereby certify:

That on the 23d day of June, 1930, I was a duly qualified and acting Judge of the Third Judicial District of the State of Idaho and, as such Judge, was sitting and holding court in Ada County therein; that I have examined the judgment of the court, together with the various records and files in this case, for the purpose of refreshing my recollection

of proceedings had before me on said date; that during the morning of June 23, 1930, several matters were being presented to me in the south courtroom of the Ada County courthouse at Boise, Idaho; that at about the hour of 11:00 o'clock A. M., the hearing of one contested matter was concluded and immediately thereupon James F. Ailshie, Jr., stepped to the bench, court being still in session, and made a motion for judgment in favor of Vivian F. Baldwin and E. R. Baldwin and against the American Surety Company upon its supersedeas undertaking filed in [111] the case of Vivian F. Baldwin and E. R. Baldwin vs. Singer Sewing Machine Company, a Corporation, and Ed Anderson, Defendants, and thereupon submitted a form of judgment, together with the complete records and files in said cause, including the opinion of the Supreme Court of the State of Idaho in said case, dated April 10, 1930, and the remittitur issued pursuant thereto, also the undertaking of the American Surety Company referred to in the opinion of the Supreme Court of the State of Idaho, dated May 2, 1931, in Baldwin vs. American Surety Company, and I thereupon asked said James F. Ailshie, Jr., if notice had been given the Surety Company and he replied that none was necessary, whereupon I requested of him authorities in connection with the matter, which were handed to me, including U. S. Fidelity and Guaranty Co. vs. Fort Misery Highway District, reported in 22 Fed. (2d) 369, and Wood vs. Orford, 56 Cal. 157. I then told him I would consider the motion and take the matter under advisement; that I thereafter examined said authorities

and the records and files in the action, and at approximately 3:30 o'clock P. M. of said day I consulted with Judge Dana E. Brinck in his office in the Ada County courthouse, during which time said attorney James F. Ailshie, Jr., was waiting in the north or large courtroom in said building; that immediately upon leaving Judge Brinck's office I stepped into said north or large courtroom and advised the said attorney that the motion was granted, and that I had signed the said judgment which is dated June 23, 1930, and caused the same to be immediately entered by the Clerk. [112]

That the recitals as they appear in the judgment against the Surety Company, above referred to, correctly state the facts as they occurred. I further certify that said judgment was not entered merely *pro forma* but was signed after I had considered the motion, studied the files and read a number of authorities, and none of said proceedings were Chambers proceedings.

Dated this 23d day of June, 1931.

CHAS. F. KOELSCH,
District Judge. [113]

Filed June 30, 1931. Stephen Utter, Clerk. By B. Clyde Eagleson, Deputy.

[Title of Court and Cause—No. 11,860.]

## OBJECTION TO CONSIDERATION OF PRETENDED MOTION OF AMERICAN SURETY COMPANY OF NEW YORK.

Come now the plaintiffs above named and OBJECT to the consideration of the pretended motion

of the American Surety Company of New York heretofore filed, and as grounds therefor say:

I.

That the Court is without jurisdiction to hear said motion and is without jurisdiction to amend that certain judgment entered in the above-entitled cause on the 23d day of June, 1930, for the following reasons, among others:

A. That said judgment of June 23, 1930, is a final judgment, and from and after the 2d day of June, 1931, this Court has had no power to take any action whatsoever respecting said judgment save and excepting to issue execution thereon.

B. That no motion to amend said judgment was made at the term of court during which said judgment was entered, and that one term of the District Court of the Third Judicial District of the State of Idaho in and for the County of Ada has been opened and closed, and a second term opened and still in session, since the closing of the term at which said judgment was entered, and more than six months had elapsed after the close of the term [114] at which said judgment was entered before said motion to amend or reform said judgment was filed or made herein.

C. That said motion is based on pretended facts not contained in the records and files of the action, and of which the records and files exhibit no evidence whatever.

D. That the affidavits of Frank Martin and McKeen F. Morrow, or either of them, set forth no

fact showing any error in, or cause for amending, said judgment, and the pretended statements of fact at variance with the recitals in said judgment, contained in said affidavits, constitute hearsay, and said affidavits and the said pretended facts therein contained would not, and could not, constitute competent legal evidence in this regard.

II.

Paragraph II of said motion constitutes a second motion made in this court to vacate and set aside the judgment of June 23, 1930, for the reason that on June 26, 1930, the said defendant American Surety Company of New York filed and presented to this court a motion to vacate and set aside said judgment, which said motion was thereafter passed upon by this court and was passed upon by the Supreme Court of the State of Idaho in an opinion dated May 2, 1931, to which reference is hereby made, and that thereafter the remittitur of the Supreme Court was filed in this court on the 2d day of June, 1931.

III.

That on the 17th day of June, 1931, and prior to the filing or serving of defendant's motion, an execution pursuant to said judgment of June 23, 1930, was issued out of this Honorable Court and was placed in the hands of the sheriff of Ada County, Idaho, on June 17, 1931, and levy was made by the said sheriff of Ada County on property of the American Surety Company of New York on said date, and that proceedings in execution [115] have at all times since said date been under way, and are now pending.

IV.

That all of the recitals contained in said judgment of June 23, 1930, are in fact true and correct.

V.

That said motion is sham and frivolous.

JAMES F. AILSHIE, Jr.,
J. R. SMEAD,
Attorneys for Plaintiffs. [116]

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DEFENDANT'S SHOWING No. 3.

U. S. District Court, District of Idaho. Filed Jul. 22, 1931. W. D. McReynolds, Clerk. By ————, Deputy.

In the District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada.

CIVIL No. 11,860.

VIVIAN F. BALDWIN and E. R. BALDWIN,
Plaintiffs,

vs.

ED ANDERSON and AMERICAN SURETY COMPANY OF NEW YORK, a Corporation,
Defendants.

COURT REPORTER'S TRANSCRIPT.

Date: June 30, 1931, in Boise, Idaho.

FRANK J. KESTER,
Official Reporter, Boise, Idaho. [117]

In the District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada.

CIVIL No. 11,860.

VIVIAN F. BALDWIN and E. R. BALDWIN,
Plaintiffs,

vs.

ED ANDERSON and AMERICAN SURETY COMPANY OF NEW YORK, a Corporation,
Defendants.

REPORTER'S TRANSCRIPT.

This cause came regularly on for hearing on motion of defendant American Surety Company of New York to amend and vacate the judgment theretofore entered against said defendant on June 23, 1930, at the courthouse in Boise, Ada County, Idaho, commencing at 2:15 o'clock in the afternoon of Tuesday, June 30, 1931, before the Honorable CHAS. F. KOELSCH, District Judge, sitting without a jury, the plaintiffs and the said defendant American Surety Company of New York being represented by counsel, and said defendant Ed Anderson not being present in person or by counsel.

APPEARANCES:

For the Plaintiffs: JAMES F. AILSHIE, Jr., and JOHN R. SMEAD, Attorneys-at-law, Boise, Idaho.

For the Defendant American Surety Company of New York: MARTIN & MARTIN, and [118] RICHARDS & HAGA, Attorneys-at-law, Boise, Idaho.

Transcript prepared and proceedings reported by FRANK J. KESTER, Official Court Reporter, Third Judicial District, Boise, Idaho.

WHEREUPON, the following proceedings were had, to wit:

The COURT.—I desire to have a reporter here to make a record of this statement. Let me state at this time that I have read these affidavits. This matter was called to my attention one day by General Martin and Mr. Morrow coming into my office without preliminary notice as to what was wanted, and at that time asked me to state from memory what I recalled as to the physical proceedings concerning the matter that had taken place the year before; and at that time I gave them, as nearly as I could from memory, what I recalled.

Since that time I have of course studied this matter over, and tried to recall the things that took place, with the appreciation of the importance attached thereto by counsel; and even with that restudy I find that there was but one major error I made in my oral statement to counsel upon the day referred to.

At that time I stated that, according to my memory, [119] the matter was presented to me one day and considered at least to another day, and I think I stated possibly two days, but at least to another day; however, since studying the matter over I find that I was in error in reference to that. As I recall it, and recall it distinctly, because I have since ascertained the associations of other matters with this, the matter was presented to me in the morning and I then read the authorities referred

to, and signed the judgment on the afternoon of the same day. I recall distinctly that that was the fact, and that it was not, as I told counsel at first, carried over to another day.

There may have been other matters that were not just as clear in my mind as they are, but whatever they are, the statement I made was made—and I may say there may be errors in my statement now —was made from my best recollection at that time; and if it helps this matter any I am willing to state it offhand just exactly as I recall it:

On the morning of June 23, 1930, there was a matter argued before me, with J. F. Martin counsel on the one side and Vestal Coffin of the Firm of Fisher and Coffin on the other side; the matter was entitled Dufresne Automobile Company against Hamilton. That matter was set for ten o'clock; and the record of this court shows that there was another matter of which I have absolutely no independent recollection, namely, the matter of paroling or sentencing of a defendant under a criminal statute, but which, as I say, I have absolutely no independent recollection. [120] I do recall the civil proceeding. It took place in the south courtroom of this courthouse, and the argument was ended, as I recall it, along about eleven o'clock in the morning. A few minutes before the argument was ended, James F. Ailshie, Jr., came into the courtroom and sat down in one of the jurors' chairs, and to all intents and purposes was listening to the argument made by counsel in the other matter.

So soon as counsel in the other matter concluded, Mr. Ailshie came to my desk, which was the Judge's

desk in the courtroom, from which I had not stepped, at that time handed me a document, and orally stated, "I move,"—in substance and effect,—"I move for the entry of this judgment."

I looked at it, and when I saw the title of it, and saw and appreciated what he had said, the first question that I asked was in about this way, "Well, was notice given to the other side?" I did not use the word "defendant," but I said "to the other side."

Mr. Ailshie then responded that no notice was necessary, and that he had authorities to show that no notice was necessary. I was about to step off of my bench, anyway, and I then said to him, "You will have to show me the authorities," and Mr. Ailshie then and there handed me a printed, paper-bound booklet which was a transcript used in the federal court in the case of Fort Misery Highway District against somebody, defendant, whose name I have forgotten—or at least the Fort Misery Highway District was one of the parties; it may have been a defendant— [121] but in it, it included an opinion of Judge Dietrich of the federal court on this question that I have asked counsel, whether notice had been given to the other side.

I took this matter under advisement, and told Mr. Ailshie that I would read the opinion to which he pointed out in that paper-bound transcript, and Mr. Ailshie then also called my attention to a decision from the California court entitled, Wood against Orford, which he claimed was in point on this question of the propriety of entering this judgment.

I looked at that decision before Mr. Ailshie left my Chambers. I might say that by that time we had reached my Chambers. I looked at that decision, and as I did so I asked for Mr. Ailshie's interpretation of that decision. It resulted in a little discussion as to the import of that decision, and I told Mr. Ailshie I would consider the matter further, and he then left.

I did consider it further, and read Judge Dietrich's opinion, and re-read the decision in Wood *versus* Orford. In the afternoon I studied the matter over quite at length, and I think it was somewhere about three-thirty that afternoon when I picked up the proposed judgment and walked to Judge Brinck's Chambers with the idea of getting his view on what I was about to do—because by that time I had more or less made up my mind as to what I should do.

When I reached Judge Brinck's Chambers, I found James F. Ailshie, Jr., there. From the actions of the two men I [122] drew the conclusion —the correctness of which was afterwards verified —that when I stepped into Judge Brinck's Chambers they were in fact talking about this very procedure; but the moment I entered they ceased, and in fact the manner of their ceasing was what gave me the intimation that they had been talking about that matter. They then took up another subject of conversation while I sat down, and re-read the judgment, which was at that time still unsigned. In a moment or two Mr. Ailshie left, and I remarked to Judge Brinck, "I am about to sign an important judgment." Judge Brinck smiled, and

let me understand without so saying, that he understood what judgment I referred to.

I then remarked, in substance and effect, that I had studied over the matter and believed that was the only thing for me to do. Judge Brinck responded by saying, "I would do it, because undoubtedly the defendant will take some procedure which will get it its day in court."

My recollection is that I then and there borrowed from Judge Brinck his fountain-pen and signed the judgment in his Chambers. Of this matter I am not positive, however, because I have not seen the original judgment.

And let me say here that I might change my mind as to where, the exact place I was when I signed this judgment, if I could see the judgment itself, from these facts: If it was signed with Judge Brinck's fountain-pen, which my memory tells me it was, the handwriting would be heavy handwriting, because fountain-pens are [123] not easy-flowing, and I write a very light hand when I have an easy-writing pen; therefore, if the judgment is signed by a free-flowing hand, it must have been signed at the Clerk's desk. But I reiterate that my memory serves me that I signed it in Judge Brinck's Chambers with his fountain-pen, and that I, before or after signing, walked in to the Clerk's desk and—if I didn't sign it there, if it had been signed,—handed it to the Clerk and told him to enter it.

General FRANK MARTIN. — (Interposing.) Would your Honor—

The COURT.—Just one minute—I will make it

more full, and then you can make your statement. (Continuing.) So far as the statements made to counsel, made when they called upon me upon the day referred to, and under the circumstances referred to, I state now that I at no time said that this was not done in open court. I did say at that time that I considered it, the signing of the judgment, merely a formal matter at that time.

Let me repeat that I stated in the interview with General Martin and Mr. Morrow that at that time I considered that the signing of the judgment in the way it was done was a formal matter, with the idea that the defendant would take such procedure as would give it a hearing.

And let me say that I have at all times considered this judgment just as sound as any other judgment I have ever signed. Let me also say that I may have been too informal in the ceremonies attendant upon my signing [124] this judgment, due to the fact that I never did attach the importance to ceremonies and rituals that some people attach thereto, and in my judgment the mere ceremony cannot add to or detract from either the man or the instrument.

(At the direction of Court and counsel, the discussion had at this juncture was omitted.)

The COURT.—(After examining the files.) Having now examined the judgment, and my signature thereto, I state unhesitatingly that I was in error when I said that the judgment was signed in Judge Brinck's Chambers, or with his fountain-pen. The judgment was signed at the Clerk's desk, and with his pen, or one of his pens.

General FRANK MARTIN.—Now, would your

Honor mind stating when your session adjourned that day, as near as you can remember?

The COURT.—The session—

General FRANK MARTIN.— —of the court?

The COURT.—Well, General, we consider the court in session all the time. Just as you noticed just now: There was a man brought in here to be arraigned, and I stepped up on to the bench and considered that court was in session. As I understand it, the theory is that we start our February term in February, and we are in continuous session.

General FRANK MARTIN.—I don't mean the session which continues on from day to day; I mean the daily session.

The COURT.—Well, that's a conclusion that can be [125] drawn; different minds can draw different conclusions from it. If I am in my Chambers and a matter comes up during the day that requires my stepping up on the bench to hear it, I do so, and consider that court is in session.

General FRANK MARTIN.—What time did your Honor leave, that day?

The COURT.—How is that?

General FRANK MARTIN.—Well, what time did your Honor leave the bench that day?

The COURT.—About eleven o'clock, as I stated.

General FRANK MARTIN.—That's what I wanted you to state.

The COURT.—Yes, I didn't come back on the bench that day, unless that came up in the afternoon —but if that came up in the morning I did not again step up on the bench that day.

General FRANK MARTIN.—Now, if your Honor please, we move tc strike out the statement purporting to be the statement of the Judge of this court, attached to the affidavit of the plaintiffs, and that the statement of your Honor in open court be considered as the only statement of your Honor in this case, because there are some conclusions made in this statement.

The COURT.—Well, that statement was made, General, on the request of counsel, prepared by them, and by me signed; and if there is anything inconsistent with what I have said now, what I have now stated is my best recollection. [126]

General FRANK MARTIN.—Your best recollection, notwithstanding these other statements?

The COURT.—Yes.

Mr. AILSHIE.—Your Honor please, we resist the motion.

(Argument on this motion omitted.)

The COURT.—I will let them all stand.

Mr. AILSHIE.—You state that this was prepared by counsel for the plaintiffs, which is correct, but as I am advised—

The COURT.—(Interposing.) Referring to the statement I made there?

Mr. AILSHIE.—Yes. But as I am advised, the statement which counsel for the plaintiff prepared was corrected by you and rewritten before it was signed?

The COURT.—Yes, I can show you the parts that were rewritten; I can show you the parts that I objected to, that were rewritten. Have you a copy of it?

Mr. AILSHIE.—I haven't the original copy, but I was simply advised—

The COURT.—(Referring to statement.) On page 2 thereof, the original stated—well, it reads, "that immediately upon leaving Judge Brinck's office I stepped into said north or large courtroom and advised the said attorney that the motion was granted, and that I had signed the said judgment." The statement as originally made, and which I objected to and had corrected, was to the effect that I walked into the north or large courtroom and advised the counsel that the motion was [127] granted and that I would sign the said judgment—indicating that I had walked into the courtroom and signed it, which happens to be the fact, now, although I asked that that be changed before I signed it; and though it appears now that that was the fact, my independent recollection still tells me that I signed it in there; but I am convinced against my will that I didn't, and that if I had signed it with Judge Brinck's pen it would be a different signature than it is.

Mr. AILSHIE.—Let me state that the reason I prepared that statement in that way was because it was my independent recollection that you signed it at the Clerk's desk. In deference to your Honor's recollection, I did not state positively in my affidavit where it was signed, because of the fact that your Honor felt that it was signed in Judge Brinck's room, rather than out here; and that caused me to have some doubt as to the accuracy of my recollection, because my independent recollection is that you signed it out here in the courtroom.

The COURT.—My independent recollection of that fails me. It must have been some other document I signed with Judge Brinck's pen.

Mr. MORROW.—I assume the statement is concluded, your Honor?

The COURT.—Yes. We will not need the reporter any further.

(Argument of counsel to the Court, omitted.)

## REPORTER'S CERTIFICATE.

I, Frank J. Kester, do hereby certify: [128] That I am one of the official reporters of the Third Judicial District of the State of Idaho; that under the direction of the Honorable Chas. F. Koelsch I attended the above-entitled hearing and correctly reported in shorthand the testimony and proceedings taken and had at said hearing; that the foregoing reporter's transcript is a full, true, correct, and complete transcript of my shorthand notes taken at said hearing, and is a full, true, correct, and complete record of the testimony given and the proceedings had thereat.

Dated this 21st day of July, 1931.

FRANK J. KESTER,
Official Reporter, Boise, Idaho. [129]

[Title of Court and Cause.]

## ORDER AND CERTIFICATE SETTLING TRANSCRIPT.

In the above-entitled matter the defendant having filed in the above-entitled court and cause its

motion to amend and vacate the judgment theretofore entered against said defendant herein on June 23, 1930.

And said motion coming on to be heard in the above-entitled court on June 30, 1931, and defendant through its counsel of record herein thereupon requesting that the undersigned Presiding Judge of said court make a statement of record in connection with the hearing of the said motion as to the facts and circumstances under which said judgment herein against said defendant was entered as aforesaid.

Whereupon the said Presiding Judge in response to said request made such statement, which was taken in shorthand by the official reporter of said court,—

NOW, THEREFORE it is hereby certified that the transcript of such statement hereto attached is a true and correct record of such statement and it is hereby ordered that the same be, and hereby is, settled as a correct transcript and record of such statement made by said Presiding Judge as above recited.

(Signed) CHARLES F. KOELSCH,
District Judge. [130]

Filed July 13, 1931. Stephen Utter, Clerk. By B. Clyde Eagleson, Deputy.

[Title of Court and Cause—No. 11,860.]

## NOTICE OF APPEAL.

To the Above-named Plaintiffs Vivian F. Baldwin and E. R. Baldwin, and to James F. Ailshie,

Jr., and J. R. Smead, Their Attorneys of Record, and to Ed Anderson, Defendant, and to H. B. Walker, His Attorney of Record, and the Clerk of the Above-entitled Court:

You, and each of you will please take notice that American Surety Company of New York, a corporation, surety, one of the above-named defendants, hereby appeals to the Supreme Court of the State of Idaho from that certain judgment for $22,357.-21, filed and entered against the said defendant in the District Court of the Third Judicial District of the State of Idaho, in and for Ada County on June 23, 1930, and from the whole of said judgment against said defendant American Surety Company of New York.

Dated this 13th day of July, 1931.

RICHARDS & HAGA,
MARTIN & MARTIN,
Attorneys for Defendant American Surety Company of New York, Residence: Boise, Idaho.

Service of the above and foregoing notice of appeal is hereby admitted this 13th day of July, at 2:10 P. M.

JAMES F AILSHIE, Jr.,
J. R. SMEAD,
Attorneys for Plaintiffs. [131]

Service of the above and foregoing notice of appeal is hereby admitted this 13th day of July, 1931.

ED ANDERSON,
Defendant.

State of Idaho,
County of Ada,—ss.

McKeen F. Morrow, being first duly sworn upon his oath, deposes and says: That he is one of the attorneys for defendant and appellant American Surety Company of New York in the above-entitled cause; that on the 13th day of July, 1931, at 3:45 o'clock P. M. of said day, he served a copy of the above and foregoing notice of appeal upon H. B. Walker, attorney of record for defendant Ed Anderson, by depositing at said hour on said date in the United States Postoffice at Boise, Idaho, a true and correct copy of the above and foregoing notice of appeal enclosed in an envelope with ordinary postage prepaid thereon addressed to said H. B. Walker at Laramie, Wyoming; that said H. B. Walker since the trial herein has left the State of Idaho and his present residence and postoffice address is Laramie, Wyoming, and there is direct communication by United States mail between said Postoffice at Boise, Idaho, and Laramie, Wyoming.

McKEEN F. MORROW.

Subscribed and sworn to before me this 13th day of July, 1931.

[Seal] H. M. JEFFREY,
Notary Public for Idaho.
Residence: Boise, Idaho. [132]

Filed July 13, 1931, 4:04 P. M. Stephen Utter, Clerk. By B. Clyde Eagleson, Deputy.

[Title of Court and Cause.]

UNDERTAKING ON APPEAL.

WHEREAS, the above-named defendant American Surety Company of New York has appealed to the Supreme Court of the State of Idaho from that certain judgment in the above-entitled cause filed and entered in the above-entitled court on the 23d day of June, 1930, and

WHEREAS, the said defendant desires to give an undertaking for all damages and costs that may be awarded against it on said appeal or a dismissal thereof as provided to be given by Section 7154, Idaho Compiled Statutes, 1919;

NOW, THEREFORE, in consideration of the premises and such appeal, Fidelity and Deposit Company of Maryland, a corporation organized and existing under and by virtue of the laws of the State of Maryland and duly authorized to give undertakings on appeal and become sole surety upon bonds and undertakings in judicial proceedings in the State of Idaho, does hereby undertake and promise on the part of said defendant and appellant American Surety Company of New York that said defendant and appellant will pay all costs and damages which may be awarded against it on said appeal or a dismissal thereof not exceeding the sum of Three Hundred Dollars ($300.00).

IN WITNESS WHEREOF, the said Fidelity and Deposit Company of Maryland, a corporation, has caused its corporate name to be hereunto subscribed and its corporate seal to be hereunto affixed by its duly authorized officers and agents this 13th day of July, 1931.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND.

[Corporate Seal] By GEO. C. WALKER,
Attorney-in-fact.
WALTER S. BRUCE,
Agent.

Countersigned:

WALTER S. BRUCE,
Resident Agent. [133]

Filed July 15, 1931. Stephen Utter, Clerk. By B. Clyde Eagleson, Deputy.

[Title of Court and Cause—No. 11,860.]

## NOTICE OF APPEAL.

To the Above-named Plaintiffs Vivian F. Baldwin and E. R. Baldwin, and to James F. Ailshie, Jr., and J. R. Smead, Their Attorneys of Record, and to Ed. Anderson, Defendant, and to H. B. Walker, His Attorney of Record, and to the Clerk of the Above-entitled Court:

You and each of you will please take notice that American Surety Company of New York, a corporation, surety, one of the above-named defendants, hereby appeals to the Supreme Court of the State of Idaho from that certain order of the above-en-

titled Court made and entered on the 13th day of July, 1931, denying and overruling the motion of said defendant American Surety Company of New York to correct said judgment to make it speak the truth in certain particulars and to vacate said judgment as corrected and from the whole of said order.

Dated this 14th day of July, 1931.

RICHARDS & HAGA,
MARTIN & MARTIN,
Attorneys for Defendant American Surety Company of New York.

Residence: Boise, Idaho.

Service of the above and foregoing notice of appeal is hereby admitted this 14th day of July, 1931.

JAMES F. AILSHIE, Jr.,
J. R. SMEAD,
Attorneys for Plaintiffs. [134]

Service of the above and foregoing notice of appeal is hereby admitted this 14th day of July, 1931.

ED ANDERSON,
Defendant.

State of Idaho,
County of Ada,—ss.

McKeen F. Morrow, being first duly sworn, upon his oath, deposes and says: That he is one of the attorneys for defendant and appellant American Surety Company of New York in the above-entitled cause; that on the 14th day of July, 1931, he served a copy of the above and foregoing notice

of appeal upon H. B. Walker attorney of record for defendant Ed. Anderson, by depositing on said date in the United States Postoffice at Boise, Idaho, a true and correct copy of the above and foregoing notice of appeal enclosed in a sealed envelope with ordinary postage prepaid thereon addressed to said H. B. Walker at Laramie, Wyoming; that said H. B. Walker about the month of July, 1930, left the State of Idaho and his present residence and postoffice address is Laramie, Wyoming, and there is direct communication by United States mail between said Postoffice at Boise, Idaho, and Laramie, Wyoming.

McKEEN F. MORROW.

Subscribed and sworn to before me this 14th day of July, 1931.

[Seal] H. M. JEFFREY,
Notary Public for Idaho.
Residence: Boise, Idaho. [135]

Filed July 15, 1931. Stephen Utter, Clerk. By B. Clyde Eagleson, Deputy.

[Title of Court and Cause—No. 11,860.]

UNDERTAKING ON APPEAL.

WHEREAS, the above-named defendant American Surety Company of New York, has appealed to the Supreme Court of the State of Idaho from that certain order in the above-entitled cause made and entered in the above-entitled Court on the 13th day of July 1931, and

WHEREAS, the said defendant desires to give

an undertaking for all damages and costs that may be awarded against it on said appeal or a dismissal thereof as provided to be given by section 7154, Idaho Compiled Statutes, 1919;

NOW, THEREFORE, in consideration of the premises and such appeal, Fidelity and Deposit Company of Maryland, a corporation organized and existing under and by virtue of the laws of the State of Maryland and duly authorized to give undertakings on appeal and become sole surety upon bonds and undertakings in judicial proceedings, in the State of Idaho, does hereby undertake and promise on the part of said defendant and appellant American Surety Company of New York that said defendant and appellent will pay all costs and damages which may be awarded against it on said appeal or a dismissal thereof not exceeding the sum of Three Hundred Dollars ($300.00).

IN WITNESS WHEREOF, the said Fidelity and Deposit Company of Maryland, a corporation, has caused its corporate name to be hereunto subscribed and its corporate seal to be hereunto affixed by its duly authorized officers and agents this 15th day of July, 1931.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND.

[Corporate Seal] By GEO. C. WALKER,
Attorney-in-fact.
WALTER S. BRUCE.
Agent.

Countersigned:

WALTER S. BRUCE,
Resident Agent. [136]

Filed July 15, 1931. Stephen Utter, Clerk. By B. Clyde Eagleson, Deputy.

[Title of Court and Cause.]

APPLICATION FOR ORDER FOR REPORTER'S TRANSCRIPT.

To the Honorable CHARLES F. KOELSCH, Judge of the Above-entitled Court:

The above-named defendant American Surety Company of New York, a corporation, having appealed to the Supreme Court of the State of Idaho from that certain order made and entered on July 13, 1931, denying defendant's motion, hereby applies for an order directing the court reporter of this court to prepare a transcript of the proceedings had in said cause on June 30, 1931, including the statement made from the Bench by the Court at that time.

Dated this 15th day of July, 1931.

RICHARDS & HAGA,
MARTIN & MARTIN,
Attorneys for Defendant,
American Surety Company of New York.
Residence: Boise, Idaho. [137]

Filed July 15th, 1931. Stephen Utter, Clerk. By B. Clyde Eagleson, Deputy.

[Title of Court and Cause.]

ORDER RE PREPARATION AND COMPLETION OF TRANSCRIPT OF PROCEEDINGS.

To Frank Kester, Court Reporter of the Above-entitled Court:

You are hereby ordered to prepare a complete transcript of the proceedings had in the above-entitled cause on June 30, 1931, including the statement made by the Court from the Bench and to lodge the same with the Clerk of the above-entitled court within sixty days from the date hereof.

Dated this 15th day of July, 1931.

CHAS. F. KOELSCH,
District Judge.

Estimated Fee, $5.00, paid, and service of the above order and receipt of copy thereof is hereby admitted this 15th day of July, 1931.

FRANK J. KESTER,
Court Reporter. [138]

Journal Y, District Court, Ada County, Idaho—Page 429.

Boise, Idaho, July 13th, 1931.

One hundred and tenth judicial day of the District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada. Present: Hon. CHAS. F. KOELSCH, District Judge, and the officers of the Court.

## MINUTES OF COURT—JULY 11, 1931—ORDER OVERRULING AND DENYING MOTION OF AMERICAN SURETY COMPANY TO CORRECT JUDGMENT.

After the reading and approval of the minutes of July 11th, 1931, the following proceedings were had, to wit:

No. 11,860.

VIVIAN F. BALDWIN et al.

vs.

SINGER SEWING MACHINE CO. et al.

In this cause in open court, the motion of the American Surety Company to correct judgment having been heretofore taken under advisement, the Court at this time rendered its decision and overruled and denied said motion.

Thereupon the Court signed the order filed this day in the above case.

THEREUPON the Court ORDERED that this court do now adjourn until 10 o'clock A. M., July 15th, 1931.

CHAS. F. KOELSCH,
District Judge. [139]

Filed July 13, 1931. Stephen Utter, Clerk. By B. Clyde Eagleson, Deputy.

[Title of Court and Cause.]

ORDER OVERRULING AND DENYING MOTION OF AMERICAN SURETY COMPANY TO CORRECT AND AMEND JUDGMENT.

The motion of the American Surety Company of New York to correct and amend that certain judgment entered in the above-entitled cause on the 23d day of June, 1930, and to vacate and set aside the said judgment, coming on regularly for hearing on the 30th day of June, 1931, Messrs. Martin & Martin, and Richards & Haga appearing for the American Surety Company in support of said motion, and James F. Ailshie, Jr., and J. R. Smead appearing on behalf of plaintiffs, and the said motion having been argued and submitted, and briefs of counsel having been filed, the Court being now fully advised in the law and the premises, finds that said motion should be overruled and denied.

WHEREFORE, it is hereby ORDERED that the motion of the American Surety Company of New York, a corporation, to correct and amend the judgment of June 23, 1930, entered in the above-entitled cause and to vacate and set the same aside, should be and the same is hereby overruled and denied.

Done in open court this 13th day of July, 1931.

CHAS. F. KOELSCH,
District Judge. [140]

State of Idaho,
County of Ada,—ss.

I, Stephen Utter, Clerk of the District Court of the Third Judicial District of Idaho, in and for the County of Ada, do hereby certify that the foregoing are full, true and correct copies of the original.

1. Notice of motion to correct and vacate judgment.
2. Motion to correct and vacate judgment.
3. Affidavits of Frank Martin, McKeen F. Morrow, A. J. Gamble, Howard E. Stein, Thos. E. Powell and B. Clyde Eagleson.
4. Court Journal entry of June 23d, 1930.
5. Certificate and affidavits of James F. Ailshie, Jr., Charles F. Koelsch, and J. R. Smead.
6. Objection of plaintiffs to consideration of motion.
7. Order denying motion to correct and vacate judgment.
8. Notice of appeal (filed July 13, 1931.)
9. Undertaking on appeal (filed July 13, 1931).
10. Notice of appeal (filed July 15, 1931).
11. Undertaking on appeal (filed July 15, 1931).
12. Application for order for reporter's transcript.
13. Order for reporter's transcript, and
14. Court journal entry of July 13, 1931; filed in the above-entitled action and remain-

ing now on file in my office at Boise City, Idaho.

Given under my hand and the seal of said District Court this 18th day of July, 1931.

[Seal] STEPHEN UTTER,
Clerk of the District Court.
By Otto F. Peterson,
Deputy. [141]

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U. S. District Court, District of Idaho. Filed Jul. 22, 1931. W. D. McReynolds, Clerk. By ————, Deputy.

DEFENDANTS' SHOWING No. 2.

In the District Court of the United States, for the District of Idaho, Southern Division.

AMERICAN SURETY COMPANY OF NEW YORK, a Corporation,
Complainant,

vs.

VIVIAN F. BALDWIN and E. R. BALDWIN,
Defendants.

AFFIDAVIT OF CHARLES F. KOELSCH.

United States of America,
District of Idaho,
Southern Division,—ss.

Charles F. Koelsch, being first duly sworn on oath, deposes and says: That I am one of the duly qualified and acting Judges of the District Court of the Third Judicial District of the State

of Idaho, wherein is situated the county of Ada, and have occupied such position since prior to the 23d day of June, 1930; that on the 23d day of June, 1931, I executed a certificate as District Judge in the case of Vivian F. Baldwin and E. R. Baldwin, Plaintiffs, vs. Ed Anderson and American Surety Company of New York, a Corporation, Defendants, pending in the District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada; which said certificate was filed in said District Court on the 30th day of June, 1931, and the statements contained in said certificate are true.

I further state that upon refreshing my recollection and after an examination of the original judgment of June 23, 1930, and my signature appearing thereon, that said judgment was signed by me in open court in the north courtroom in the Ada County courthouse. [142]

I further state that no wrong, false or fraudulent statements or representations were made to me by either of the attorneys for plaintiffs, Vivian F. Baldwin and E. R. Baldwin, at the time motion was made for judgment against the American Surety Company on June 23, 1930. I further state that no fraud was practiced upon the said District Court of the Third Judicial District, of the State of Idaho, in and for the County of Ada, or myself, as one of the Judges thereof, in the making of motion for judgment against the American Surety Company of New York, on the 23d day of June,

1930, or in obtaining my order granting the said motion, or in the entry of said judgment. I further state that no representations of any kind or character other than as set out in my certificate of June 23, 1931, filed June 30, 1931, were made to me by either of the plaintiffs' attorneys, or by any other person, in connection with said motion for judgment, my consideration thereof, or the granting thereof and entry of judgment pursuant thereto.

(Signed) CHARLES F. KOELSCH.

Subscribed and sworn to before me this 21st day of July, 1931.

[Seal of District Court, Third Judicial District, State of Idaho]

STEPHEN UTTER,
Clerk.
By Clyde B. Eagleson,
Deputy Clerk. [143]

[Title of Court and Cause.]

AFFIDAVIT OF JAMES F. AILSHIE, JR.

United States of America,
District of Idaho,
Southern Division,—ss.

James F. Ailshie, Jr., being first duly sworn, on oath deposes and says: That at all times hereinafter mentioned, I have been and now am a member of the Idaho Bar and as such have been one of the attorneys of record for plaintiffs in the case of Vivian F. Baldwin and E. R. Baldwin, Plaintiffs, vs. Singer Sewing Machine Company and Ed Anderson, Defendants; complaint in which was filed

in the District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada, on or about March 1, 1928; that I have participated in all proceedings, including the proceedings had in the District Court for Ada County on the 23d day of June, 1930. That heretofore and on the 30th day of June, 1931, I made affidavit in opposition to a motion of the American Surety Company of New York to correct and vacate that certain judgment referred to in the bill of complaint in the above-entitled cause, entered by the District Court for Ada County, on the 23d day of June, 1930; which said affidavit was filed in said District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada, on [144] the 30th day of June, 1931.

That on the date of signing this affidavit, I have read my affidavit of June 30, 1931, in full, and I now say that the statements therein contained are true. That I have read complainants' bill of complaint filed in the above-entitled cause and know the contents thereof.

I further state that no wrong, false or fraudulent statements or representations were made by myself or any other person at the time motion was made for judgment against the American Surety Company on June 23, 1930. I further state that no fraud was practiced upon the said District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada, or upon the Hon. Charles F. Koelsch, as one of the Judges thereof,

in making motion for judgment against the said American Surety Company of New York, on the 23d day of June, 1930; or in the obtaining of the order of the court and of Hon. Charles F. Koelsch, the Judge who granted the same, or in the entry of said judgment.

I further state that no representations of any kind or character other than as set out in my affidavit of June 30, 1931, and the certificate of Hon. Charles F. Koelsch, certified copy of which is filed herein, were made by me or by any other person in my presence, to the said Hon. Charles F. Koelsch, in connection with said motion for judgment, the consideration thereof or the granting thereof and entry of judgment pursuant thereto.

JAMES F. AILSHIE, Jr.

Subscribed and sworn to before me this 21st day of July, 1931.

[Seal] W. D. McREYNOLDS,
Clerk.
By [Signature illegible],
Deputy. [145]

[Title of Court and Cause.]

AFFIDAVIT OF J. R. SMEAD.

State of Idaho,
County of Ada,—ss.

J. R. Smead, being first duly sworn, deposes and says that he is the identical person whose affidavit was filed in a proceeding in the District Court of

the Third Judicial District of the State of Idaho, in and for Ada County, which proceeding was had on a motion by defendant to amend and vacate the judgment of that court against defendant and in favor of plaintiffs in the case entitled Vivian F. Baldwin and E. R. Baldwin, Plaintiffs, vs. American Surety Company of New York, a Corporation, Defendant; that a certified copy of said affidavit is filed herein and herewith and affiant by this reference thereto incorporates herein said affidavit and deposes and says that the statements therein contained are true and correct.

J. R. SMEAD.

Subscribed and sworn to before me this 21st day of July, 1931.

[Seal] FERN B. JONES,
Notary Public for Idaho, Residence Boise, Idaho.

[146]

[Title of Court and Cause.]

AFFIDAVIT OF J. EMER HARRIS.

State of Idaho,
County of Ada,—ss.

J. Emer Harris, being first duly sworn, deposes and says that he is the duly appointed, qualified and acting deputy sheriff of Ada County, State of Idaho; that in such capacity there was delivered to him on June 17, 1931, a writ of execution duly issed out of, and under the seal of, the District Court of the Third Judicial District of the State of

Idaho, in and for the County of Ada, in the case of Vivian F. Baldwin and E. R. Baldwin, Plaintiffs, vs. American Surety Company of New York, a Corporation, Defendant, a true copy of which writ is hereto attached; that on the same day he served said writ on the duly elected, qualified and acting treasurer of the State of Idaho, who was by law the custodian of certain bonds belonging to the said American Surety Company of New York, and by notice of levy made on said treasurer, at the same time demanded that he deliver to the sheriff of Ada [147] County, State of Idaho, said bonds; that in response to said levy and demand, said treasurer on June 19th, 1931, delivered to me, as such deputy sheriff, the bonds described in the attached notice of sheriff's sale; that thereupon the said sheriff took the same into his custody by virtue of said writ, and thereafter, on June 25, 1931, there were duly posted in three public places in said county, notices of execution sale of said bonds, a true copy of which notice is here attached.

That on June 20th, affiant served on American Surety Company of New York a notice of said levy of said writ of execution, a true copy of which notice is also hereto attached, by mailing the same in the United States postoffice, securely sealed and addressed to said American Surety Company, No. 100 Broadway, New York City, with the necessary postage attached, which letter was registered and a return receipt requested, which return was thereafter received.

That by virtue of said writ of execution, issued by and out of the court aforesaid, there is now pending an execution sale of said bonds as commanded by said writ, for the purpose of satisfying the judgment entered in said cause and recited in said writ.

(Signed) J. EMER HARRIS.

Subscribed and sworn to before me this 21st day of July, 1931.

[Seal] FRANK J. KESTER,
Notary Public for Idaho.
Residence, Boise, Idaho. [148]

[Title of Court and Cause.]

AFFIDAVIT OF JAMES BRANDON.

State of Idaho.
County of Ada,—ss.

James Brandon, being first duly sworn, deposes and says that he is a duly appointed, qualified and acting deputy sheriff of Ada County, State of Idaho; that acting in said capacity, on June 25, 1931, in city of Boise, Ada County, State of Idaho, he served on O. O. Haga, as attorney at law and also as attorney-in-fact for American Surety Compny of New York, a true copy of the notice of levy of writ of execution attached to the affidavit of Emer J. Harris herein, by delivering the same to O. O. Haga personally in his office in the Idaho Building in said city of Boise.

(Signed) JAMES BRANDON.

Subscribed and sworn to before me this 21st day of July, 1931.

[Seal] FRANK J. KESTER,
Notary Public for Idaho,
Residence Boise, Idaho. [149]

[Title of Court and Cause.]

AFFIDAVIT OF JOHN McGRATH.

State of Idaho,
County of Ada,—ss.

John McGrath, being first duly sworn, deposes and says: That he is the duly elected, qualified and acting sheriff for the county of Ada, State of Idaho; that acting in the said capacity on June 24, 1931, he served on the duly appointed, qualified and acting Commissioner of Finance of the State of Idaho, by delivery of true copy thereof at his office in the state capitol, county of Ada, State of Idaho, the notice of levy of writ of execution attached to the affidavit of J. Emer Harris herein.

(Signed) JOHN McGRATH.

Subscribed and sworn to before me this 21st day of July, 1931.

[Seal] FRANK J. KESTER,
Notary Public for Idaho,
Residence Boise, Idaho. [150]

U. S. District Court, District of Idaho. Filed Jul. 21, 1931. W. D. McReynolds, Clerk. By ————, Deputy.

[Title of Court and Cause—No. 1626.]

## MOTION TO DISMISS.

Come now the defendants and move the Court to dismiss the purported bill of complaint of the American Surety Company of New York, a corporation, heretofore filed in the above-entitled cause upon the following grounds:

I.

That the said bill of complaint does not state any facts sufficient to constitute a valid cause of action in equity, and does not set forth any facts to entitle complainant to the relief prayed or to any relief in equity.

II.

That the said bill of complaint is insufficient for want of equity and is insufficient to require defendants to answer thereto.

III.

That it appears upon the face of said bill that courts of the State of Idaho having jurisdiction to determine the issues set forth in complainant's bill of complaint acquired and exercised jurisdiction long prior to the filing [151] of said bill in the United States District Court for the District of Idaho, Southern Division, and it further appears from the face of said bill that the District Court of

the Third Judicial District of the State of Idaho in and for the county of Ada, a court created by the Constitution of the State of Idaho with original jurisdiction both at law and in equity, had at the time of the filing of said bill jurisdiction to hear a motion of complainant to amend and vacate the judgment of June 23, 1930, and had the same under advisement.

IV.

That it appears upon the face of said bill that prior to the filing of complainant's bill of complaint an execution pursuant to the judgment of June 23, 1930, had been issued out of the District Court of the Third Judicial District for the State of Idaho in and for the county of Ada, and placed in the hands of the sheriff of said county, and that said sheriff had duly and regularly levied upon certain securities belonging to complainant of the par value of $25,000.00 and had duly and regularly noticed the same for sale, to be held August 5, 1931, and that complainant's bill of complaint constitutes an attempt upon the part of complainant to stay proceedings of the District Court of the Third Judicial District of the State of Idaho in and for the county of Ada, and of the Supreme Court of the State of Idaho.

WHEREFORE, defendants pray that complainant's bill of complaint be dismissed and that defendants recover their costs and disbursements herein.

JAMES F. AILSHIE, Jr.,
J. R. SMEAD,
Attorneys and Solicitors for Defendants.
Residence and Postoffice Address: Boise, Idaho.

Service admitted this 21st day of July, 1931.

RICHARDS & HAGA,
MARTIN & MARTIN,
Attorneys for Plaintiffs. [152]

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U. S. District Court, District of Idaho. Filed Jul. 21, 1931. W. D. McReynolds, Clerk. By ————, Deputy.

[Title of Court and Cause.—No. 1626.]

MOTION TO STRIKE.

Come now the defendants and move the court to strike from complainant's bill of complaint the following matters to wit:

I.

In Paragraph IX strike the following: " * * * which representations were wrong, false and fraudulent and were a fraud upon said District Court and upon the Honorable Charles F. Koelsch, one of the Judges thereof,"

II.

In Paragraph XII strike the following: "and said Supreme Court held in substance and effect that the application to the District Court for judgment on said undertaking presented a judicable inquiry, and that the District Court was without power or authority to vacate and set aside said judgment by a motion to vacate, and said Supreme Court of Idaho further held in said appeal that it

was without power to construe said undertaking on the appeal so taken by the defendants herein from the order vacating said judgment and that it could not on said appeal determine or construe said [153] undertaking or determine whether the District Court had jurisdiction of the person of plaintiff at the time said judgment (Exhibit 'C') was entered against this plaintiff, or whether said District Court had any power or authority to enter any judgment whatsoever against this plaintiff after said Singer Sewing Machine Company had been dismissed from said action."

III.

Strike all of Paragraph XIII.

IV.

Strike all of Paragraph XV except the following: "That * * * this plaintiff moved the said District Court of the Third Judicial District of the State of Idaho in and for Ada County to correct the recitals in said judgment * * * and said motion is now pending before said District Court undetermined and undecided."

V.

Strike from Paragraph XVIII the words "and the manner in which the same was obtained is and was a fraud upon this plaintiff and upon said District Court."

This motion is made and based upon the grounds that each of the foregoing parts, portions and para-

graphs of said bill of complaint is redundant, impertinent and scandalous.

JAMES F. AILSHIE, Jr.,
J. R. SMEAD,
Attorneys and Solicitors for Defendants.
Residence and Post Office Address: Boise, Idaho.

Service admitted this 21st day of July, 1931.
RICHARDS & HAGA,
MARTIN & MARTIN,
Attorneys for Defendants. [154]

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U. S. District Court, District of Idaho. Filed Jul. 25, 1931. W. D. McReynolds, Clerk. By ————, Deputy.

[Title of Court and Cause—No. 1626.]

## COUNTER-AFFIDAVIT OF McKEEN F. MORROW.

United State of America,
District of Idaho,
Southern Division,—ss.

McKeen F. Morrow, being first duly sworn, on his oath, deposes and says:

That he is a member of the firm of Richards & Haga, and that said firm of Richards & Haga, with Messrs. Martin & Martin, have been attorneys of record for the above-named plaintiff American Surety Company of New York in that certain action pending in the District Court of the Third Judicial District for the State of Idaho, in and for

Ada County, entitled: Vivian F. Baldwin and E. R. Baldwin vs. Ed Anderson and American Surety Company of New York, in which the judgment (Exhibit "C" to the bill of complaint herein) was entered, and that Messrs. Martin & Martin were attorneys for the Singer Sewing Machine Company, originally a defendant in said cause from the time Singer Sewing Machine Company appeared therein until said company was dismissed from said action, and that J. F. Martin is a member of said firm of Martin & Martin.

That about June 18 or 19, 1931, James F. Ailshie, Jr., one of the attorneys for defendants herein and one of the attorneys for plaintiffs in said suit in the state court above referred to, told affiant that when he, the said James F. [155] Ailshie, Jr., entered the courtroom of the Ada County District Court on June 23, 1930, he found that said J. F. Martin, a member of the firm of Martin & Martin, as aforesaid, was arguing a case before said Court, the Hon. Charles F. Koelsch presiding, and that he, the said James F. Ailshie, Jr., purposely waited until said J. F. Martin had left the courtroom before asking the Hon. Charles F. Koelsch, District Judge, to sign the judgment (Exhibit "C" to the bill of complaint herein). That the only purpose of said James F. Ailshie, Jr., in so waiting was to conceal from the said Singer Sewing Machine Company and its attorneys and its surety, plaintiff herein, any knowledge or information regarding said application for judgment.

That on August 12, 1930, the firm of Richards & Haga received from Hon. Charles F. Koelsch, Dis-

trict Judge, a memorandum opinion in said state court case of Vivian F. Baldwin and E. R. Baldwin vs. Ed Anderson and American Surety Company of New York determining the motion of said Surety Company, plaintiff herein, to vacate the judgment (Exhibit "C" to the bill of complaint herein); that said memorandum opinion is not part of the files in said cause and a true and correct copy of said memorandum opinion is hereto attached, marked Exhibit "A," hereby referred to and made a part of this affidavit.

That on the 4th day of May, 1931, the Supreme Court of Idaho in the case of Mountain States Implement Company, a Corporation, Respondent, vs. N. E. Arave et al., Defendants, and William Arave, Appellant, rendered a decision dismissing the appeal of William Arave and in the event that said decision becomes final it may have an important bearing upon the right of complainant herein to appeal to the Supreme Court of Idaho from the judgment entered June 23, 1930 (Exhibit "C" to the bill of [156] complaint herein). That thereafter within the time allowed by law, attorneys for appellant in said cause filed a petition for rehearing in the said Supreme Court of Idaho, which has not yet been disposed of and said decision has not yet become final nor has the same been reported. That a certified copy of the said decision of the Supreme Court is hereto attached, marked Exhibit "B," hereby referred to and made a part of this affidavit.

That on or about June 16, 1931, an order was entered by the Supreme Court of Idaho in the said

cause of Mountain States Implement Company vs. Arave allowing the attorneys for plaintiff herein ten days to file a brief *amici curiae* in said cause and said brief was filed June 26, 1931, and in said brief it was urged that the Court should grant a rehearing and deny the motion to dismiss said appeal.

That on or about July 1, 1931, an order was entered by the Supreme Court of Idaho in said cause of Mountain States Implement Company vs. Arave allowing the attorney for respondent in said cause and James F. Ailshie, Jr., the attorney for defendants herein and also attorney for plaintiffs in the said state court suit of Baldwin vs. Anderson and American Surety Company, thirty days from July 1, 1931, to file a brief in reply to the said brief of *amici curiae* in said cause.

That in the event the Supreme Court of Idaho should deny the petition for rehearing in said cause of Mountain States Implement Company vs. Arave and adhere to its original decision dismissing said appeal, there will be grave doubt as to the right of plaintiff herein, American Surety Company of New York, to obtain a hearing on the merits of the appeal taken by it on June 13, 1931, from the judgment of June 23, 1930 (Exhibit "C"). That Mr. Ailshie's only reason for filing the brief in said [157] Arave case is to obtain a decision which will enable defendants herein to have the said appeal of plaintiff dismissed by the Supreme Court and will thus enable them to avoid a hearing on the merits of said judgment of June 23, 1930, and also

to avoid having the Supreme Court of Idaho construe the undertaking (Exhibit "A" to the bill of complaint herein).

McKEEN F. MORROW.

Subscribed and sworn to before me this 25th day of July, 1931.

[Seal] H. M. JEFFREY,
Notary Public for Idaho,
Residence: Boise, Idaho.

Service of the above affidavit and receipt of a copy thereof, together with a copy of each of the exhibits therein referred to is hereby admitted this 25th day of July, 1931.

J. R. SMEAD,
JAMES F. AILSHIE, Jr.,
Attorneys for Defendants. [158]

EXHIBIT "A."

In the District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada.

VIVIAN F. BALDWIN and E. R. BALDWIN,
Plaintiffs,

vs.

SINGER SEWING MACHINE COMPANY, a Corporation, and ED. ANDERSON,
Defendants.

MEMORANDUM OPINION.

Messrs. JAMES F. AILSHIE, Jr., and J. R. SMEAD, Attorneys for Plaintiffs,
MARTIN & MARTIN and RICHARDS & HAGA, Attorneys for Surety Company.

On March 1, 1928, the plaintiffs filed their complaint in this court against the defendants, asking for damages for alleged injuries to the person of the plaintiff Vivian F. Baldwin, as the result of being struck by an automobile driven by the defendant, Ed. Anderson, who, it is alleged was at the time an employee and agent of the defendant, Singer Sewing Machine Company, and allegedly engaged in his master's business at the time of the accident. The action was tried in May, 1928, before this Court and a jury, which found a verdict for the plaintiffs and against both defendants, in accordance with which verdict judgment was on May 31, 1928, entered for plaintiffs and against both defendants, for the sum of $19,500.00 and costs.

On August 27, 1928, the following notice of appeal was filed: [159]

> "You and each of you will please take notice that the defendant, Singer Sewing Machine Company, a corporation, and Ed. Anderson, hereby appeal to the Supreme Court of the State of Idaho, from that certain judgment entered in the above-entitled action on the 31st day of May, 1928, for the sum of $19,573.70

against the defendants, and each of them, and from the whole thereof.

Dated August 27, 1928.

MARTIN & MARTIN and
H. B. WALKER,
Attorneys for Defendants,
Residence: Boise, Idaho.

And on the 29th day of August, 1928, the said appellants filed an undertaking on appeal, in the penal sum of $300.00, with the American Surety Company of New York as surety.

On the same day the defendants jointly made application for an order directing the Reporter to make a transcript of the evidence and proceedings on the trial, and also filed a joint praecipe to the Clerk for a transcript of the designated files and papers. And, also on the said 29th day of August, 1928, there was filed a stay or supersedeas bond reading as follows:

(Title Court and Cause.)

Whereas the defendant, Singer Sewing Machine Company, a corporation, in the above-entitled action has appealed to the Supreme Court of the State of Idaho from the judgment made and entered against it in the above-entitled action and in the above-entitled court in favor of the plaintiffs in said action on the 31st day of May, 1928, for the sum of Nineteen Thousand Five Hundred ($19,-500.00) Dollars and for Seventy-three and 70/100 ($73.70) Dollars costs in said suit, making a total of Nineteen Thousand Five Hundred Seventy-three

and 70/100 ($19,573.70) Dollars, and from the whole of said judgment;

AND WHEREAS, the said appellant, Singer Sewing Machine Company, a Corporation, is desirous of staying the execution of said judgment so appealed from;

NOW, THEREFORE, the undersigned American Surety Company, a corporation, authorized to, and doing business in the State of Idaho, in consideration of the premises and of such appeal on the part of said appellant, Singer Sewing Machine Company, a corporation, does hereby acknowledge itself firmly bound in the sum of Twenty-five Thousand ($25,000.00) Dollars, gold coin of the United States, that if the said judgment appealed from, or any part thereof, be affirmed, or the appeal dismissed, the appellant will pay in gold coin of the United States [160] of America, the amount directed to be paid as to which said judgment shall be affirmed, if affirmed only in part, and all damages and costs which may be awarded against the appellant upon the appeal, and that if the said appellant does not make such payment within thirty days from the filing of the remittitur from the Supreme Court in the court from which the appeal is taken, judgment may be entered on motion of the respondents in their favor and against the undersigned surety for the said sum of Nineteen Thousand Five Hundred Seventy-three and 70/100 ($19,573.70) Dollars, together with the interest that may be due thereon and the damages and costs which may be

awarded against the said appellant, Singer Sewing Machine Company, upon the appeal.

IN WITNESS WHEREOF, the said American Surety Company, has caused its name and seal to be attached hereto by its proper officers and agents at Boise, Idaho, this 28th day of August, 1928.

AMERICAN SURETY COMPANY OF NEW YORK.

(Seal) By HOWARD E. STEIN,
Attorney-in-fact.

Countersigned:

HOWARD E. STEIN,
Agent at Boise, Idaho.

Countersigned:

RICHARDS & HAGA.
O. O. HAGA.

It is hereby agreed that the within bond is hereby accepted in so far as the amount is concerned without regard to it being double the amount of the judgment.

Dated at Boise, Idaho, this 29" day of August, 1928.

JAMES F. AILSHIE, Jr.,
J. R. SMEAD,
Attorneys for Plaintiffs.
Residence: Boise, Idaho.

The foregoing acceptance of said bond by the plaintiffs is endorsed thereon.

The Supreme Court rendered its opinion on the appeal, on April 10, 1930, reversing the judgment as to the defendant [161] Singer Sewing Machine Company, on the ground that though the de-

fendant Anderson was at the time of the accident an employee or agent of the Singer Sewing Machine Company, he was not at the precise time of the accident engaged in his master's business, but was acting for himself. The Court affirmed the judgment as against Anderson.

On the 24th day of May, 1930, in accordance with the remittitur from the Supreme Court, this Court made and entered its judgment that plaintiffs take nothing from the defendant Singer Sewing Machine Company, but that the latter have judgment against said plaintiffs for its costs in the Supreme and District Courts, amounting to over $500.01. And, on the 23d day of June, 1930, in pursuance of a motion by the attorneys for the plaintiffs reciting that the judgment against the defendant Ed. Anderson, had been affirmed, but that the same had not been paid, and that more than 30 days had elapsed since the filing herein of the remittitur from the Supreme Court, this Court entered judgment against both defendants, together with the costs allowed by the Supreme Court as against the defendant Anderson, in favor of the plaintiffs, and against the American Surety Company of New York, surety on the supersedeas bond hereinbefore set out.

On the 26th day of June, 1930, the said American Surety Company of New York, by its attorneys, served and filed the present motion, asking that the last-named judgment be vacated and set aside as null and void.

This motion is based upon the contention that the judgment against the Surety Company is void

for the reason that the said supersedeas bond was given only on the part of the defendant Singer Sewing Machine Company, and for the purpose of staying the execution of the original judgment against it, only, and not as a stay of said judgment as against the co-defendant Ed. Anderson.

The argument of counsel for the Surety Company is that under our statute (C. S. 7151), one or more of several judgment [162] debtors may appeal; that an appeal may be taken without a supersedeas or stay bond, and, hence, though two or more or all of several judgment debtors may appeal, execution of the judgment would be stayed only as to those putting up supersedeas bond or bonds, and not as to those, though appealing, who do not put up such stay bond or bonds. And, it is contended that the bond in question here shows on its face that it was put up as a stay of execution only as against the defendant Singer Sewing Machine, and, as the Supreme Court held the judgment against it erroneous, and reversed it, there is no breach of the condition of the bond and the surety is not liable.

The contention of the attorneys for the plaintiffs is that the bond stayed the execution as against both appellants; that the condition of the bond was that if the judgment be affirmed in whole or in part, the surety would pay whatever was affirmed; and that, as the judgment was affirmed in part, to wit: as to the defendant Ed. Anderson, which judgment has not been paid by Anderson, plaintiffs are entitled to judgment against the surety.

In support of this contention, plaintiffs' counsel

point to the fact that the original judgment was a joint judgment against both defendants; that the appeal therefrom was by a joint notice of appeal, in other words, was a joint appeal by both defendants; and that the application for an order for transcript, and the praecipe to the Clerk for his transcript, were all joint acts on the part of the defendants; and counsel for plaintiffs further point out that according to the preamble to the bond, the same was put up for the purpose "of staying the execution of the said judgment so appealed from," without qualification or limitation as to either appellant.

On these facts counsel argue that the bond stayed any execution of the judgment, and was, in fact and in law, a stay bond for or on the part of both appellants. [163]

Counsel for plaintiffs, to arrive at their conclusion that the surety is liable for the judgment as affirmed against the appellant Anderson, argue that "there can be but one execution issued upon a joint judgment," and that as the supersedeas bond stayed execution against the Singer Sewing Machine Company, it likewise stayed it against Anderson. In support of this conclusion counsel for plaintiffs quote from Miller vs. Pine Mining Co., 3 Idaho, 603, the following:

> "This execution should not have issued, as the proper bond was placed on file."

In that case there was but one appellant, and the bond was in the usual form, but the affidavit of qualification of the sureties was defective, in that

the notary had neglected to affix his signature. For this reason it was contended the bond was void, and did not prevent execution. The Court held that the affidavit was no part of the undertaking; that the bond was valid, and that execution should not have issued. Clearly the case is not applicable to the questions involved in the case at bar.

Plaintiffs also quote from the note on page 464 or 19 Ann. Cas., as follows:

> "Where judgment is rendered against several defendants jointly, the plaintiff is not entitled to have a separate execution issued against each of the defendants."

The note is appended to a case which holds that "The assignee of a part of a judgment will not be allowed to issue execution for so much of the judgment debt as was assigned to him."

In fact, a reading of the cases found in the annotation shows that they were all cases where attempts were made to divide a judgment into two or more parts, and to levy separate executions for each part. This the Courts uniformly hold should not be allowed, as that would unnecessarily harass a judgment creditor. But this is far from saying that but one execution may be issued to enforce a joint judgment. [164]

However, I do not understand plaintiffs' counsel to contend for a literal construction of the language that but one execution can issue to enforce a joint judgment. Nor do I understand that they contend that in all cases the staying of execution against one of several joint, or joint and several, judgment

debtors, necessarily stays it against all. For, on page 7 of their brief, they admit that "this situation cannot be compared with the situation which might be presented if a bond had been presented which merely stayed execution of a part of the judgment, for in that case the rule in Miller vs. Pine would perhaps not be applicable and the plaintiffs would be entitled to an execution although it could only be levied against the defendant as to whom the execution was not stayed, or as to such part of the judgment as was not stayed."

In other words, their contention resolves itself to this: that the wording of the present bond is such that it acted as a stay bond for both appellants.

And I agree that the crux of the question before me is to determine whether the language of the bond, considered in connection with the other steps on the appeal, particularly the joint notice of appeal, shows it to have been a stay bond on behalf of both appellants, or only for the appellant Singer Sewing Machine Co.

In support of the contention that the bond did stay any execution of this judgment, counsel for plaintiffs cite, as "a case most nearly in point," Thomas vs. Lee et al., (Wn.), 133 Pac. 446.

The question there arose on a motion to dismiss the appeal on the ground that while the appeal was a joint appeal of all the three defendants, the bond was signed by but two of the defendants as principals therein. The Court overruled that attack on the bond, basing its ruling on the case of Fidelity and Deposit Company of Maryland vs. Seattle R.

& S. Ry. Co., (Wn.) 97 Pac. 453, which latter case holds that "Under the statute as it now exists an appeal bond is sufficient if given on behalf of the appellant, when signed by the surety alone." (The underscoring is mine.) [165]

With this case as authority, the Court in the former case (Thomas vs. Lee), held that the omission of the name of one of the appellants as principal was immaterial, and found from the language of the bond that "the bond fairly indicates that it is given on behalf of all the appellants." The language quoted, and on which the Court apparently based its conclusion that the bond was given on behalf of all appellants, is: "if the above-named principals, D. H. and G. W. Lee, shall pay to A. F. Thomas * * * all costs and damages * * * and shall satisfy and perform the judgment or order appealed from in case it shall be affirmed, and any judgment or order which the Supreme Court may render or make * * *, then this shall be void" * * *, etc.

I do not consider this language nearly so parallel to the language of the bond in the present case, as the language of the bond in the California case of Bergevin vs. Wood, 105 Pac. 935, where the condition of the bond was that the surety promised "on the part of said appellant that said appellant will pay the amount of said judgment so appealed from and all costs, if the appeal is withdrawn or dismissed, or the amount of any judgment and all costs that may be recovered against him in the action in the said Superior Court." It was

held that the bond was in behalf of one only of the two defendants, though the preamble to the bond recited that: "Whereas the said defendants are dissatisfied with the said judgment, and are desirous of appealling therefrom to the Superior Court of the County of Amador, and pending such appeal claim a stay of proceedings and are desirous of staying the execution of the said judgment so rendered as aforesaid."

It will be noticed that the nouns and pronouns, and the verbs appearing in this preamble, are in the plural form, while in the condition of the bond they are in the singular.

In the bond under consideration in the case at bar, the nouns and pronouns referring to the appellant are all in the singular, and the verbs correspond therewith. Thus, in the preamble, it [166] is recited that "Whereas the defendant Singer Sewing Machine Company * * * has appealed * * * from the judgment made and entered against it," * * * "And, whereas the appellant Singer Sewing Machine Company, a corporation, is desirous of staying the execution of said judgment so appealed from";

This preamble says nothing about the appeal on the part of the defendant Ed. Anderson; it speaks only of the appeal by the Sewing Machine Company. It will also be noticed that it refers to the judgment as a "judgment made and entered against it." If this thought be kept in mind, it is logical to conclude that in the phrase expressing the desire

of staying execution of "said judgment," it likewise referred only to the judgment in so far as it concerned it, and it alone.

But thus far I have considered only the preamble, which after all, does not constitute the contract on the part of the surety. And while this preamble (as well as the notice of appeal, etc.) may be considered, and in case of doubt, might solve the doubt, the contract of the surety must be ascertained from the condition and the obligation of the bond. And here, the language of the bond under consideration is even more explicit in its limitation to the Singer Sewing Machine Company, as a single appellant:

> "Now therefore, the undersigned American Surety Company * * * in consideration of the premises, and of such appeal on the part of said appellant, Singer Sewing Machine Company * * * "acknowledges itself bound, etc., "that if the said judgment appealed from, or any part thereof, be affirmed, or the appeal dismissed, the appellant will pay * * * the amount directed to be paid as to which said judgment shall be affirmed, if affirmed only in part, and all damages and costs which may be awarded against the appellant upon the appeal, that if said appellant does not make such payment within 30 days * * * judgment may be entered * * * against the undersigned surety for the said sum of $19,573.70, together with interest that may be due thereon and the damages and

costs which may be awarded against the said appellant, Singer Sewing Machine Company." [167]

This language, it seems to me, is far more explicit than that found in the bond considered in Thomas vs. Lee, and more certain even than that contained in the bond considered in Bergevin vs. Wood. And, certainly, when construed in the light of the rule laid down by the cases that a surety is entitled to strict construction of his undertaking, the bond leaves no room for doubt that it was intended, and in effect, is, a bond only on behalf of the appellant Singer Sewing Machine Company.

The motion to declare the judgment void, and to set the same aside, will therefore be granted. Counsel for the Surety Company will prepare the proper order to this effect.

Dated August 11, 1930.

(Signed) CHARLES F. KOELSCH,
District Judge. [168]

EXHIBIT "B."

In the Supreme Court of the State of Idaho.

No. 5682.

Pocatello, March Term, 1931. Filed May 4, 1931. Clay Koelsch, Clerk.

MOUNTAIN STATES IMPLEMENT COMPANY, a Corporation,

Respondent,

vs.

N. E. ARAVE et al.,

Defendants,

and

WILLIAM ARAVE,

Appellant.

Appeal from the District Court of the Ninth Judicial District, for Bonneville County. Hon. C. J. Taylor, Judge.

Motion to dismiss appeal. Appeal dismissed.

OTTO B. McCUTCHEON, THATCHER & YOUNG, for Respondent.

CROWLEY & CROWLEY, for Appellant.

GIVENS, J.—December 20, 1929, the Clerk of the trial court entered on a jury's verdict, a judgment in favor of respondent. March 12, 1930, the court denied motions filed by defendants Arave, to vacate and set aside the verdict and judgment, but on his own motion, March 12, 1930, the same day,

entered an order vacating the judgment, which order on appeal (Mountain States Implement Co. vs. Arave, 49 Ida. 710, 291 Pac. 1074), was held unauthorized. There was heretofore no appeal from the original judgment. October 21, 1930, the trial court, remittitur in the above appeal having been filed October 16, 1930, vacated its former order and ordered the judgment of December 20, 1929, reinstated; an unnecessary and ineffective provision, since the judgment had never been dethroned. [169] October 21, 1930, the appeal herein was taken from the judgment, which appeal respondent moves to dismiss as filed too late.

We have carefully examined the more recent authorities passing upon this point, and the following cases hold that proceedings, ineffective as to the previous judgment, toll the statute during the time they are in operation, or being considered by the trial court: Rogers vs. Savage, (Wash.) 201 Pac. 768; In re German Ditch Co., (Colo.) 139 Pac. 2; Kamors vs. Kan. City Ry., (Mo) 202 S. W. 434; Scott vs. Rees, 253 S. W. 998 (Mo.); St. Clair vs. Conlon, 12 App. D. C. 161; So. Pac. vs. Sartoris, 27 Fed. (2d) 852.

The following authorities hold that such proceedings do not toll the statute: Miller vs. Prout, 32 Ida. 728, 187 Pac. 948; Walton vs. Clark, 40 Ida. 86, 231 Pac. 713; Boam vs. Sewell, 41 Ida. 718, 241 Pac. 1020; Pedigo vs. Fuller, (Wash.) 79 Pac. 1129; Hahn vs. Astoria National Bank, (Ore.) 125 Pac. 284; Spotton vs. Superior Court, (Cal.) 171 Pac. 801; In re Big Bend Irr. Dist., (Wyo.) 208

Pac. 872; First National Bank vs. Chowning, (Okla.) 218 Pac. 676; Burch vs. Smith, (Wyo.) 218 Pac. 791; Scott vs. Woodhams, (Colo.) 246 Pac. 1027; Western Land & Irr. Co. vs. Humfeld, (Ore.) 247 Pac. 143; Kline vs. Murray, (Mont.) 257 Pac. 465; Alvarado vs. Stanton, (Cal.) 267 Pac. 313; Oxford Tel. Co. vs. Ark. National Bank (Ark.) 204 S. W. 1140; Jowell vs. Lamb, (Tex.) 207 S. W. 987; Pearce vs. Peo. Sav. Bank, (Ark.) 238 S. W. 1063; Liberty Cent. Trust Co. vs. Roy, (Mo.) 245 S. W. 1085; Dent vs. Farmers' and Merchants' Bank, (Ark.) 258 S. W. 322; Beach vs. Beach, 145 N. Y. S. 409; Hild vs. McClintie Marshall Co., 215 N. Y. S. 88; Stamfer vs. Peter Hand Brewing Co., (Ind.) 118 N. E. 138; Wyant vs. Russel, (Ohio) 142 N. E. 144; Neighbors vs. Thistle Down Co., (Ohio) 159 N. E. 111; In re Slimmers Estate, (Minn.) 178 N. W. 954; In re Rocky Run Drainage Dist., (Wis.) 200 N. W. 384; Levine vs. Roth, (Pa.) 120 Atl. 115; U. S. vs. Fid. & Dep. Co., 155 Fed. 117; Collins Pav. Co. vs. Helseapple, (Ala.) 128 So. 599; [170] Bache & Co. vs. Locke, 86 Pa. Super. Ct. 501; Meadville Tel. Co. vs. Shafer, 94 Pa. Super. Ct. 246; Buckley vs. Sutton, 38 Mich. 1; Quinn Chapel A. M. E. Church vs. Pease, 66 Ill. App. 552; Marder Luse and Co. vs. Campbell Printing Co., 76 Ill. App. 431.

It must be kept in mind that the order vacating the judgment was void. In the case at bar, the court had no jurisdiction to issue the order setting aside the previous judgment. A void order is of no effect whatever. (Williams vs. Sherman, 36 Ida. 494 at 503, 212 Pac. 971; Johnson vs. Carrol, (Ky.)

228 S. W. 412; White vs. Hidalgo County Water Imp. Dist., 6 S. W. (2d) 790 (Tex.); Simmons vs. Hefter, (Ill.) 139 N. E. 404; People vs. Miller, (Ill.) 171 N. E. 672; In re Woolley's Estate, (Vt.) 117 Atl. 370; Hunt vs. Kennedy Coal Corp., (Va.) 124 S. E. 189; U. S. ex rel. Rauch vs. Davis, 8 Fed. (2d) 907.)

It is urged that a distinction is to be made in favor of appellant herein, by reason of the fact that the court entered the order of its own motion, not on appellant's motion. It is doubtful if much effect may be given such contention in the action herein, in view of the record, which shows that while the court entered this order on his own motion, it was on the very day he denied appellant's motion seeking the same thing. The authorities above cited, *pro* and *con,* do not appear, however, to take as the foundation for their ruling, action based on appellant's motion, rather than on the court' own initiative, reasoning that because the order, however prompted, is void, stands undisturbed, and the appeal therefrom, not in time, confers no jurisdiction on the appellate court, which, as to the last, was the express pronouncement in Miller vs. Prout, *supra,* at page 731:

> "This appeal not having been perfected within ninety days from the entry of the original judgment, conferred no judisdiction upon this court."

and in the same opinion, the court held that an appeal would lie [171] from the judgment which it was sought to vacate, while an appeal was pend-

ing from an order vacating such judgment, the court saying:

> "The proceeding under this statute is an independent proceeding and exists concurrently with the right of appeal from the judgment. Any order made pursuant to such a proceeding does not operate to extend the time for appeal from the judgment. The proper course is to appeal from the judgment if it is desired to have the judgment reviewed and to apply to the trial court for relief under this section, notwithstanding such appeal."

The order in the instant case was none the less void because made on the court's own motion.

It appears, therefore, by numerical weight and better reasoning, the authorities hold that a void order does not operate as a stay, or toll the statutory time for appeal.

> "The code provisions limiting the time in which to appeal are mandatory, and the time limited cannot be extended by the court, or by any circumstances, except by the pendency of proceedings on motion for a new trial." 2 Cal. Jur., § 171, p. 404.

The exception is provided for by special statute passed in 1915, and the doctrine is laid down in Leake vs. City of Venice, (Cal.) 185 Pac. 424. We do not have such a statute.

Where the order vacating the judgment is a nullity, the statute begins to run from the rendition

or entry of the judgment vacated. (3 C. J., § 1052, p. 1055.)

Appeal dismissed; costs to respondent.

Lee, C. J., and Varian J., concur. [172]

McNAUGHTON, J., Dissenting.—I am unable to concur with the majority opinion. As I understand the record the judgment was entered December 20, 1929. On February 6th the defendant moved to set aside the judgment. On March 12th this motion, treated as a motion for new trial, was denied. Thereupon the court took a hand and its own motion set aside the judgment and ordered a new trial. April 10th the plaintiff appealed from the order setting aside the judgment and granting a new trial. This order was reversed on appeal, and on October 21, 1930, on the remittitur, the original judgment was reinstated. Defendant on that day filed notice of appeal from the original judgment. We are confronted with a motion to dismiss the appeal from the judgment as filed too late.

The majority opinion, it seems to me, does not give sufficient consideration to the fact that the order setting aside the judgment was on the court's own motion. That is to say I fear the court treats this order as an order entered in a proceeding against the judgment. I say this because all of the long list of cases cited deal with orders entered in proceedings against the judgment. As stated in the opinion: " * * * the following cases hold that proceedings, ineffective as to the previous

judgment, toll the statute during the time they are in operation, or being considered by the trial court: * * * The following authorities hold that such proceedings do not toll the statute:" Here a long line of authorities are cited, headed by two opinions by this court, which announce or follow the doctrine that one may not extend the time in which to appeal by proceedings such as moving for a new trial, or moving against the judgment.

I do not think we should treat an order entered on the court's own motion as "a proceeding" against the judgment. [173]

I feel that C. S., sec. 7152, allowing 90 days in which to appeal, is for the benefit of the party feeling aggrieved by the judgment, and intends he shall have full 90 days in which to appeal the case, or at least in which to pursue that or some other remedy. In this case the judgment stood 83 days subject to appeal. Then it was vacated, not in a proceeding against it, but on the court's own motion, and a new trial was granted. After the error made by the trial court of its own motion was cleared from the record and the judgment was reinstated, in my opinion there remained 7 days in which to appeal.

A great many courts hold that proceedings in good faith against the judgment may extend the time in which to appeal. Many, I think a majority, and among them Idaho, hold such proceedings do not extend the time. I do not care to discuss the merits of either rule. Granting that one may not extend the time in which to appeal by motion for

a new trial or motion against the judgment or for modification of the judgment, still this case is not within that rule.

In the cases cited, in support of the rule under which they are cited, and in support of the decision in this case, the losing party instead of appealing chose a different course. If he did not have his full statutory time in which to appeal it was always because the time passed while the appellant was erroneously pursuing some other remedy. The worse any of the courts have done has been to deny the party additional time because his attorney consumed the time for appeal in pursuit of the wrong remedy.

In this case we are confronted with this situation, which is out of the ordinary: The trial court having denied a motion to vacate the judgment and grant a new trial, nevertheless on his own motion entered a void order to that very effect. Had the trial court, though he thought the judgment erroneous, stopped where the proceedings before him ended, the defendant would have had yet 7 days to appeal and correct error in the judgment, if any. This [174] error of the court interfering with the appeal can hardly be fairly charged to the litigant. It seems to me he should not be deprived of the remaining time to appeal by reason of it.

Some stress is placed in the majority opinion on the fact that this order vacating the judgment was void. I cannot think that materially alters the situation. I have found no case where lawyers were so astute in the practice as to appeal from a judgment which had been vacated and set aside

by a void order, nor have I found a court or text-writer willing to vouchsafe such an extraordinary proceeding. Theoretically, of course, a void order or judgment has no force, but practically, until supplanted, it has as much force as a valid one. The fellow in jail on a void judgment theoretically is a free man, but in reality he is in jail and must stay there until a better judgment is entered carrying out the theory. In Rogers vs. Savage, (Wn.) 201 Pac. 768, the Washington court held an order setting aside a judgment and granting a new trial, which was void because beyond the power of the court, suspended the right of or reason for an appeal from the judgment, and therefore suspended the time within which the appeal must be taken under Rem. Code 1915, sec. 1718. In the absence of any authority to the contrary, I very much doubt if the appellant in this case had a right to appeal from the vacated judgment. Certainly there was no apparent reason to do so. Until something further occurred in the proceedings he was hardly an aggrieved party.

Where an attorney erroneously pursues the wrong remedy during the ninety days allowed him for appeal, rights of the other party to a speedy determination of the litigation may require a holding that such proceedings are taken by the attorney at the client's peril. To thus hold the client responsible for the errors of his attorney seems to me quite all even-handed justice requires. To charge him also with the errors of the court appears [175] to me as extending the doctrine beyond any foundation. Mt. St. Imp. Co. vs. Arave.

BUDGE, J., Dissenting.—I concur in the views expressed in the dissenting opinion of Justice McNaughton. However, it seems to me that for the administration of even-handed justice the rule should be even more broadly stated than therein announced.

The question here for determination was decided by the Supreme Court of Washington, in Rogers vs. Savage, 201 Pac. 769, under a statute similar to C. S., sec. 7152; it being held (paragraph 1, syllabus):

> "An order setting aside a judgment and granting a new trial, which was void because beyond the power of the court, suspended the right of or reason for an appeal from the judgment, and therefore suspended the time within which the appeal must be taken under Rem. Code 1915, § 1718, so that the party against whom the judgment was rendered could appeal therefrom within the statutory time after reversal of the void order."

In the instant case the judgment was set aside by the trial court of its own motion, when there yet remained seven days in which to appeal from the judgment. From the order vacating the judgment an appeal was taken to this court. Upon due consideration this court held that the order of the trial court setting aside the judgment was void and directed the reinstatement of the judgment. The majority opinion holds that the statutory time for appeal began to run from the date of entry of the original judgment, and refuses to toll

it from the time the judgment was set aside until reinstated.

When the original judgment was set aside, as is said in the Washington case, *supra,* "there became nothing from which they could appeal, and, the court having made an order granting their motion for a new trial, all reason for appeal upon their part ceased."

Where the judgment is set aside on motion of one of the parties seeking relief therefrom, the rule announced in the [176] Washington case should be followed, since the right of or reason for appeal is then suspended, and the time for appeal should likewise be suspended until a superior court, when an appeal is taken, either reverses or affirms the order of the trial court.

In the majority opinion it is said in effect that, where upon an appeal from an order vacating a judgment the entry of such order is held to be without authority and the original judgment is reinstated, the order of reinstatement is but an idle act and ineffective for any purpose, since the original judgment erroneously set aside had never been dethroned. If not dethroned, it was certainly suspended and remained in abeyance until reinstated. In such circumstances no execution could issue, and it was as if no judgment had existed.

As I read the Idaho cases cited in the majority opinion, I do not think this precise question has been passed upon, and the cases are easily distinguishable from the present case. But, if an adopted rule of procedure works an injustice a court should not hesitate to correct it at the earliest opportunity.

I think the proper rule to be that the statutory period for appeal begins to run from the date of entry of the judgment, continuing to the time the judgment is set aside by the trial court, if that be done, then tolled pending disposition of any appeal from the order setting aside the judgment and until the remittitur is received directing reinstatement of the judgment, when the statutory period for appeal from the judgment is again put in motion. In other words, the aggrieved party should have altogether the full statutory time in which to appeal from the judgment. [177]

In the Supreme Court of the State of Idaho.

No. 5682.

MOUNTAIN STATES IMPLEMENT COMPANY, a Corporation,

Respondent,

vs.

N. E. ARAVE et al.,

Defendants, and

WILLIAM ARAVE,

Appellant.

I, Clay Koelsch, Clerk of the Supreme Court of the State of Idaho do hereby certify that the annexed is a true and correct copy of the original opinion filed in the above-entitled cause on the fourth day of May, 1931, and now on file in my office.

WITNESS my hand and the seal of the court this twenty-fourth day of July, 1931.

(Seal) CLAY KOELSCH,
Clerk.

(Endorsed: Supreme Court, State of Idaho. Mountain States Implement Company, a Corporation, Respondent, vs. N. E. Arave et al., Defendants, and William Arave, Appellant. Certified Copy of Opinion.) [178]

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U. S. District Court, District of Idaho. Filed Jul. 25, 1931. W. D. McReynolds, Clerk. By ————, Deputy.

[Title of Court and Cause—No. 1626.]

AFFIDAVIT OF CHARLES F. KOELSCH.

State of Idaho,
County of Ada,—ss.

Charles F. Koelsch, being first duly sworn, deposes and says: That he is one of the Judges of the District Court of the Third Judicial District of the State of Idaho and has been such Judge during all of the year 1931 and the Judge who has at all times handled all matters in connection with Civil Case No. 11,860 in said court in which Vivian F. Baldwin and E. R. Baldwin were Plaintiffs and Ed Anderson and American Surety Company of New York, a Corporation, were Defendants.

That he is the Judge who on June 30th, 1931, made a statement from the Bench in regard to the manner in which the judgment of June 23, 1930,

in favor of the plaintiffs herein and against the American Surety Company, was made and entered.

That said statement was taken by Frank J. Kester, official reporter of said court and was thereafter transcribed by him and certified to by him as such reporter on the 21st day of July, 1931.

That thereafter, at the request of the attorneys for the plaintiffs this affiant, as District Judge, made an order and certificate settling said transcript. [179]

That at about the middle of page 9 of said transcript so settled the following occurs:

> "The COURT.—How is that?
>
> General FRANK MARTIN.—Well, what time did your Honor leave the bench that day?
>
> The COURT.—About eleven o'clock, as I stated.
>
> General FRANK MARTIN.—That's what I wanted you to state.
>
> The COURT.—Yes, I didn't come back on the bench that day, unless that came up in the afternoon—but if that came up in the morning I did not again step up on the bench that day."

In the last above-quoted statement where the expression is used "unless that came up in the afternoon" this affiant, by the use of the word "that" referred to the criminal case referred to near the bottom of page 3 of said transcript and not to the case then under consideration of Vivian F. Baldwin and E. R. Baldwin, Plaintiffs, vs. Ed Ander-

son, and American Surety Company of New York, a Corporation, Defendants.

CHARLES F. KOELSCH.

Subscribed and sworn to before me, this 25th day of July, 1931.

[Seal] FRANK MARTIN, Jr.,
Notary Public for Idaho.
Residing in Boise, Idaho.

Service of the foregoing affidavit and receipt of copy admitted this 25th day of July, 1931.

JAMES F. AILSHIE, Jr.,
J. R. SMEAD,
Attorneys for Plaintiffs. [180]

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U. S. District Court, District of Idaho. Filed Jul. 28, 1931. W. D. McReynolds, Clerk. By ————, Deputy.

[Title of Court and Cause—No. 1626.]

AFFIDAVIT OF JAMES F. AILSHIE, JR.

United States of America,
District of Idaho,
Southern Division,—ss.

James F. Ailshie, Jr., being first duly sworn, under oath, deposes and says:

That I have read the counter-affidavit of McKeen F. Morrow, which affidavit was subscribed and sworn to the 25th day of July, 1931.

That I have had frequent conversations with the said McKeen F. Morrow relative to the case of

Baldwin vs. American Surety Company and Ed Anderson.

That I did not state to said Morrow on or about June 18 or June 19, 1931, or at any other time, that I purposely waited in the morning of June 23, 1930, until J. F. Martin left the courtroom before making my motion for judgment against the American Surety Company. That as a matter of fact I stepped to the Bench immediately after the argument in the matter in which J. F. Martin was appearing was closed, which was the [181] first opportunity that I had to address the Court. That I do not know whether J. F. Martin had left the courtroom or not when said motion was made as I paid no attention to where he was or what he was doing, and I further state that at that time the firm of Martin & Martin did not to my knowledge appear as attorneys of record in any court for the American Surety Company of New York.

That I stated to said Morrow during the month of June, 1931, in the presence of J. R. Smead and Frank Martin, Sr., that I sat in the jury-box in the south courtroom of the Ada County courthouse the morning of June 23, 1930, and listened to an argument then being made before Honorable Charles F. Koelsch in which matter J. F. Martin appeared as one of the attorneys, and I further stated to said Morrow in the course of a general, casual conversation, in substance and effect that I rather smiled inwardly at the fact that J. F. Martin should be present at the time I was waiting my turn to make the motion for judgment against the American

Surety Company. I further state that I am advised that at the time said motion was made the firm of Martin & Martin were not attorneys for the American Surety Company and that therefore the said J. F. Martin would have had no right or authority to appear in connection with said motion even if I had especially asked him to remain.

I further state that the undertaking upon which the judgment was entered is countersigned:

"RICHARDS & HAGA
O. O. HAGA."

That by reason of said fact I went to the office of Richards & Haga shortly after the entry of said judgment of June 23, [182] 1930, and at said time and place stated to McKeen F. Morrow in substance and effect that they had executed a bond on behalf of the American Surety Company and that judgment had just been entered in the District Court of the Third Judicial District of the State of Idaho in and for the County of Ada in favor of Vivian F. Baldwin and E. R. Baldwin and against the said American Surety Company of New York, and that an execution had been issued pursuant thereto, and I then and there gave the said Morrow a copy of the said judgment and at his request furnished him with a copy of the said undertaking which some time before Mr. W. L. Phelps, who is the official court reporter for Judge Koelsch, had prepared for me.

I further state that there was never any effort made by me or by any other person at my direction, with my consent or to my knowledge to conceal the

said motion for judgment, and no inquiry was ever made of me by the American Surety Company or by McKeen F. Morrow or by any member of the firm of Richards & Haga to ascertain the status of said case until after the entry of judgment June 23, 1930, and no attempt or effort was made by the American Surety Company of New York to secure an adjudication of the question of its liability on that supersedeas undertaking until the said surety company filed its motion to declare the said judgment void June 26, 1930.

JAMES A. AILSHIE, Jr.

Subscribed and sworn to before me this 28th day of July, 1931.

[Seal] FERN B. JONES,
Notary Public for Idaho,
Residence: Boise, Idaho. [183]

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U. S. District Court, District of Idaho. Filed Jul. 31, 1931. W. D. McReynolds, Clerk. By ————, Deputy.

[Title of Court and Cause—No. 1626.]

## MEMORANDUM OPINION.

July 31, 1931.

RICHARDS & HAGA, McKEEN F. MORROW, MARTIN & MARTIN and FRANK MARTIN, Attorneys for Plaintiff.

JAMES F. AILSHIE, Jr., and J. R. SMEAD, Attorneys for Defendants.

CAVANAH, District Judge.—This is a bill for an injunction against the defendants and the sheriff of Ada County, Idaho, enjoining them from enforcing a judgment in favor of the defendants and against the plaintiff The American Surety Company, rendered by the state District Court. The case is before the court upon the pleadings and showing on motion for a temporary injunction which relates to a history of the proceedings surrounding the steps taken by the parties from the inception of the suit out of which the judgment arose to the time of the institution of this action. The particular proceeding in which the judgment was rendered was by motion for judgment on a supersedeas bond executed by the plaintiff under Section 7155 Idaho [184] Compiled Statutes, and which judgment the plaintiff asserts is unconscionable, inequitable and void and deprives it of its property without due process of law and denies it the equal protection of the law.

A federal court of equity is now asked to review those proceedings and by injunction stay further proceedings in the enforcement of the judgment. It presents the single question as to what extent does the power of the federal court extend when invoking its jurisdiction over proceedings had or pending in a state court, for the recognized principle will be kept in mind that if a state court has first assumed jurisdiction of the subject matter of the cause and the parties by reason of an action pending there, or that the matters in controversy have been determined by the state court having

jurisdiction of it and the parties, a federal court has no jurisdiction under the rule of comity of courts of concurrent jurisdiction to interfere with the jurisdiction of the court, or to review the merits of a controversy or annul the decrees of a court which had first obtained jurisdiction. Bearing then in mind this principle with the further thought that the federal courts accept as controlling the decisions of the highest court of the state when interpreting the statutes of the state, we are confronted with the inquiry here: Does the facts alleged in the bill and presented on the showing bring the present case under the principles thus stated?

It appears that in May, 1928, the defendant commenced an action in the state District Court against Ed. Anderson and the Singer Sewing Machine Company to recover damages for injuries alleged to have been sustained by Vivian F. Baldwin, and received a judgment against both Anderson and the Sewing [185] Machine Company in the sum of $19,500. An appeal was then taken to the Supreme Court of the state and the supersedeas bond for *$25,00* was given by the Sewing Machine Company in accordance with Section 7165 of the state statutes. Thereafter in April, 1930, the Supreme Court of the state rendered its decision in the cause and its remittitur went down to the trial court reciting that the judgment was reversed as to the Singer Sewing Machine Company and affirmed as to Anderson. The trial court then dismissed the cause as to the Sewing Machine Company, and after the expiration of thirty days from the time the remit-

titur was filed the Baldwins by their attorneys moved in court under sec. 7155, for the entry of a judgment against the plaintiff bonding company upon the supersedeas bond which was done by the court on June 23d, 1930. Three days thereafter the plaintiff moved the trial court to vacate the judgment which was granted on August 12th, 1930. An appeal was then taken from the order vacating the judgment by the defendants to the state Supreme Court, who in its decision reversed the order vacating the order and said:

> "Many assignments of error are made, but so far as this appeal is concerned we deem it necessary to consider only those which challenge the ruling of the lower court to the effect that the judgment against the surety company on the undertaking was void. * * *
>
> "We disclaim any intention or right to construe the legal effect of the undertaking in question further than to examine it in aid of determining the sole question of the court's jurisdiction to hear and determine the motion for judgment thereon.
>
> "The surety company did not claim error, and appeal. It did not claim inadvertence or mistake. It challenged the court's jurisdiction and moved to set aside the judgment as void. The whole question here is a question of jurisdiction. Nothing further. Nothing else. [186]
>
> "If a court has jurisdiction of the parties, jurisdiction of the subject matter, and jurisdiction of an issue of law or fact presented,

then its judgment upon that issue is not void whether erroneous or not. Such judgment in the absence of mistake or, in a proper case, motion for new trial, may be corrected only by appeal. * * *

"Regarding notice: Where a supersedeas undertaking for stay of execution is filed pursuant to C. S. sec. 7155, it is held the surety becomes a party to the action, and if the judgment stayed by the undertaking is affirmed in whole or in part and remains unsatisfied for thirty days, the judgment creditor may move in the action for judgment on the undertaking against the surety, and it is unnecessary to give the surety company notice of such motion. * * *

"In the case at bar the only question presented to the court was as to right to judgment on the bond which was presented to the court by appellants in the manner provided by statute for the submission of that issue. This challenged judicial inquiry.

"The question or issue presented was: Did the surety company, in its undertaking, become a party liable for every part of the judgment appealed from which might be affirmed by the Supreme Court, or did it stipulate only as to such judgment or part thereof as might be affirmed against the Singer Sewing Machine Company? To answer this question the court must look to the bond. The issue required a construction of the bond as a whole. The trial court had jurisdiction of this question. It construed the

bond in favor of appellants and against the surety company. It was not only in that court's power, but it was its duty, to decide the question submitted. * * * We think, regardless of what our construction of the bond might be, it cannot be said appellants held no right to submit the question. Nor can it be said that such submission was a fraud upon the court and on that ground its judgment was void.

"We find the trial court, upon the motion for judgment on the bond, had jurisdiction of the parties and jurisdiction of the subject-matter; that an issue was presented and it had jurisdiction to construe the undertaking and decide the issue which its judgment assumes to decide. It follows the judgment was not void, even if erroneous in the construction, and that the trial court committed error in annulling and vacating it as void." Baldwin et al. vs. Anderson et al. 299 Pac. 341. [187]

Since the decision of the Supreme Court plaintiff has taken appeals direct from the judgment and from an order denying the defendant Surety Company's motion to correct said judgment, which remain undisposed of. The statute, being section 7155, authorizing the entry of the judgment upon and undertaking on appeal has on many occasions been upheld as valid and not denying the surety of due process of law or equal protection of the law upon the theory that the surety becomes a party to the suit by its voluntary appearance made when

its supersedeas bond is filed, although notice is not given of the motion for the entry of the judgment after thirty days has elapsed from the date the primary judgment became final. Upon the primary judgment having become a final one and the conditions of the supersedeas bond having been broken the liability of surety is fixed and on motion as provided for in the statute summary judgment may be rendered on the bond. Pease vs. Rathbun-Jones Co., 243 U. S. 273; United States Fidelity & Guaranty Co. vs. Ft. Misery Highway Dist., 22 Fed. (9th C. C. A.) 369; Portland etc. Co. vs. Harley, (Ore.) 61 Pac. 346; Meridith vs. S. C. M. Co., 60 Cal. 617; Shannon vs. Dodge, (Colo.) 32 Pac. 61; United States Fidelity & Guaranty Co. vs. Ft. Misery Highway District, filed in this court of date February 21, 1927, unreported.

In proceedings to render such judgment the lower court had jurisdiction of the subject matter and the guaranty company. Toledo Scales Co. vs. Computing Scales Co., (C. C. A.) 281 Fed. 488; United States Fidelity & Guaranty Co. vs. Ft. Misery Highway Dist., *supra.*

Section 7152 of the statutes of the state gave to the plaintiff the same as every other litigant the right to appeal [188] from the judgment and to urge its contention as made here, the erroneous conclusion of the lower court as to the effect of the bond and of the judgment being void, which gave to it ample redress at law on the law side of the court. And, therefore, under the statutes of the state and the decisions of the Supreme Court,

plaintiff has had a plain, speedy and adequate remedy at law which precludes the invoking of the jurisdiction of a court of equity. Donovan et al. vs. Miller et al., 12 Ida. 601; Buzard vs. Houston, 119 U. S. 347. Nor is a court of equity open to the plaintiff because it failed to avail itself of its right of appeal from the judgment. Simonitsch vs. Bruce, 258 Fed. 331.

The contention that the judgment was entered by the trial court at Chambers and not in open court is untenable and not sustained by the record for the Trial Judge makes it clear in both his certificate and statement that it was entered in court.

The statute under which the judgment was entered being constitutional when applied to the plaintiff surety company, and the court having jurisdiction of both the subject matter and the plaintiff it would seem that the only remaining question is: Whether the judgment was obtained by fraud, accident or mistake unmixed with any fault or negligence of the plaintiff. The record seems to be silent as to any fact going to show that fraud was perpetrated upon the court in obtaining the rendition of the judgment. The allegation in the bill as to the obtaining of the judgment by fraudulent means is a conclusion and not a statement of fact showing what the fraudulent acts were. A bill for relief on the ground of fraud must be specific, and the facts constituting it must be stated, however the showing presented does not establish [189] any fraud of the conduct of counsel for defendants when he moved in open

court the entry of the judgment or thereafter, for it appears that he appeared in open court when the Judge was on the Bench and moved under the statute the entry of the judgment and tendered form of judgment to the Judge who after requiring authorities to be presented took the matter under advisement and thereafter entered the judgment, while there appears a sharp conflict between counsel as to whether the bond only secured the liability of the Sewing Machine Company, whom plaintiff asserts was the only principal in the bond for which it was surety, yet all the facts fall far short in establishing fraudulent conduct of counsel in obtaining the rendition of the judgment.

Finally the jurisdiction and right of a federal court of equity to restrain the enforcement of a judgment of a state court should not be exercised where it appears as here, that the judgment was rendered by the state court having jurisdiction of the subject matter and of the parties and that the same was not obtained by fraud, accident or mistake, and especially is that true after the highest court of the state had decided that the judgment was not void, but was rendered as authorized by the statutes and that there are still pending in the Supreme Court two appeals in which the same question submitted here is being urged. The fact that there appears a dispute as to whether the bond upon which the judgment was based covered the liability of the plaintiff goes to the merits of the case which the Supreme Court said was a judicial inquiry submitted to the trial court when the

judgment was entered. It is not in the power of a federal court to review the conclusion reached by the state court having first assumed jurisdiction upon a question which goes to the merits of the case, [190] although it may appear that such conclusion was erroneous. If such was not the rule then the doctrine of comity between courts could never prevail and confusion would exist between the decisions and processes of the federal and state courts.

These conclusions require the entry of an order sustaining the motions of the defendants to dismiss and strike and denying plaintiff's motion for a temporary injunction with costs. [191]

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U. S. District Court, District of Idaho. Filed Aug. 1, 1931. W. D. McReynolds, Clerk. By ————, Deputy.

[Title of Court and Cause—No. 1626.]

ORDER DENYING AND OVERRULING MOTION FOR TEMPORARY INJUNCTION, ETC.

This cause came on to be heard on the 28th day of July, 1931, upon plaintiff's motion for temporary injunction and the motion of defendants to dismiss the bill of complaint and the motion of defendants to strike certain portions of the bill of complaint, Richards & Haga and Martin & Martin appearing as counsel for plaintiff, and James F. Ailshie, Jr., and J. R. Smead appearing

as counsel for defendants, and said motions were argued and submitted by counsel and the Court being fully advised in the premises, and in accordance with the written decision filed July 31, 1931:

IT IS HEREBY ORDERED AS FOLLOWS:

That plaintiff's motion for a temporary injunction be and the same hereby is denied and overruled.

That the motion of defendants to strike certain portions of the bill of complaint be and the same is hereby sustained and granted.

That the motion of defendants to dismiss the bill of complaint be and the same is hereby sustained and granted.

Dated this 1st day of August, 1931.

CHARLES C. CAVANAH,
Judge.

Service admitted this 1st day of August, 1931.

RICHARDS & HAGA,
MARTIN & MARTIN,
Solicitors for Complainant. [192]

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U. S. District Court, District of Idaho. Filed Aug. 1, 1931. W. D. McReynolds, Clerk. By ————, Deputy.

In the District Court of the United States for the District of Idaho, Southern Division.

IN EQUITY—No. 1626.

AMERICAN SURETY COMPANY OF NEW YORK, a Corporation,

Complainant,

vs.

VIVIAN F. BALDWIN and E. R. BALDWIN,

Defendants.

DECREE.

On this 1st day of August, 1931, the above-named parties appearing in open court by their respective solicitors of record herein, and thereupon an order having been made and entered in open court sustaining and granting defendants' motion to dismiss the bill of complaint herein; and whereupon complainant by its said solicitors of record having refused to amend said bill or to otherwise plead further; and thereupon defendants having moved that a decree of dismissal be entered herein, which motion was granted,—

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED, that complainant's suit and bill of complaint herein be dismissed with prejudice, and that defendants recover their costs of and from the complainant taxed in the sum of $——.

Dated this 1st day of August, 1931.

CHARLES C. CAVANAH,
Judge. [193]

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[Title of Court and Cause—No. 1626.]

## AFFIDAVIT OF E. R. BALDWIN.

United States of America,
District of Idaho,
Southern Division,—ss.

E. R. Baldwin, being first duly sworn, deposes and says:

That he is one of the above-named defendants and that the other defendant is his wife; that it is not true, as stated in the affidavit for injunction pending appeal herein, that defendants are insolvent; that they have property which is of a value more than sufficient to pay their just debts and liabilities; that if the securities of complainant herein are sold on execution it will not be necessary to apply the proceeds of such sale in payment of debts of these defendants.

E. R. BALDWIN.

Subscribed and sworn to before me this 3d day of August, 1931.

JAMES F. AILSHIE,
Notary Public for Idaho.
Residence: Boise, Idaho. [203]

Filed Aug. 4, 1931. Stephen Utter, Clerk. By Thos. E. Powell, Deputy.

U. S. District Court, District of Idaho. Filed Aug. 4, 1931. W. D. McReynolds, Clerk. By ————, Deputy.

In the District Court of the Third Judicial District of the State of Idaho in and for the County of Ada.

VIVIAN F. BALDWIN and E. R. BALDWIN,
Plaintiffs,

vs.

ED ANDERSON and AMERICAN SURETY COMPANY OF NEW YORK, a Corporation,
Defendants.

STIPULATION CONTINUING SALE OF CERTAIN SECURITIES OF AMERICAN SURETY COMPANY.

It is hereby stipulated between counsel for the respective parties hereto that the sale of certain securities belonging to the American Surety Company of New York and deposited by it with the treasurer of the State of Idaho and levied upon by the sheriff of Ada County pursuant to a writ of execution issued in the above-entitled action on the 17th day of June, 1931, which said securities have heretofore been noticed for sale to be held at the hour of ten o'clock A. M. on the 5th day of August, 1931, shall be continued to the hour of ten

o'clock A. M. Friday, the 14th day of August, 1931.

This stipulation is made by all parties without waiver of any rights on behalf of any of them except as to the continuance of said sale. [208]

Dated this 4th day of August, 1931.

JAMES F. AILSHIE, Jr.,
J. R. SMEAD,
Attorneys for Plaintiffs.
RICHARDS & HAGA,
MARTIN & MARTIN,
Attorneys for Defendant American Surety Company.

ORDER POSTPONING AND CONTINUING SHERIFF'S SALE OF CERTAIN SECURITIES OF AMERICAN SURETY COMPANY.

Pursuant to the foregoing stipulation, IT IS HEREBY ORDERED that the sheriff's sale of certain securities of the American Surety Company of New York, heretofore noticed by the sheriff of Ada County, Idaho, for August 5th, 1931, be and the same hereby is postponed and continued to the 14th day of August, 1931, at ten o'clock A. M.

CHARLES E. WINSTEAD,
District Judge.

State of Idaho,
County of Ada,—ss.

I, Stephen Utter, Clerk of the District Court of the Third Judicial District of the State of Idaho,

in and for the County of Ada, do hereby certify that the foregoing is a true and correct copy of the original stipulation and order filed in the above-entitled action and remaining now on file in my office at Boise City, Ada County, Idaho.

GIVEN under my hand and the seal of said court at office in Boise City, Ada County, Idaho, this 4th day of August, 1931.

[Seal] STEPHEN UTTER,
Clerk.
By Thos. E. Powell,
Deputy. [209]

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U. S. District Court, District of Idaho. Filed Aug. 5, 1931. W. D. McReynolds, Clerk. By ————, Deputy.

[Title of Court and Cause.]

## PETITION FOR APPEAL.

American Surety Company of New York, plaintiff herein, considering itself aggrieved by the final decree of this Court made and entered herein on the 1st day of August, 1931, dismissing plaintiff's bill and the above-entitled suit, and also by that certain order made and entered in this cause on the 1st day of August, 1931, denying plaintiff's motion for a preliminary injunction, hereby appeals from said decree and order and from each and every part thereof, to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors

filed herewith, and your petitioner prays that this appeal may be allowed and that citation issue as provided by law and that a transcript of the record, proceedings and papers on which said decree and order were made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

Your petitioner further shows that it sought by its said bill of complaint and by its motion for a preliminary injunction to restrain and enjoin the said defendants and each of them, and those acting for them or in their behalf, from collecting or attempting to collect a certain judgment described in the bill of complaint and made and entered on or about the 23d day of June, 1930, in favor of the said [210] defendants and against the said plaintiff, for the principal sum of $22,357.21, together with interest and costs, which judgment was made and entered by the District Court of the Third Judicial District of the State of Idaho, in and for Ada County, and to enjoin and restrain the said defendants and those acting for them or in their behalf, from selling or attempting to sell under an execution issued upon said judgment certain securities, the property of this plaintiff, and consisting of $25,000.00 par value of United States Fourth Liberty Loan Bonds bearing interest at the rate of 4¼% per annum, which bonds your petitioner had deposited with the state treasurer of the State of Idaho under Section 5104 of the Compiled Statutes of Idaho 1919, for the purpose of qualifying this plaintiff

to carry on and do the business of a surety company in said state.

That because of the insolvency of the said defendants and each of them, and the proceedings now pending for the sale of said securities under such execution as set forth in the bill of complaint and in the affidavit of McKeen F. Morrow filed August 3, 1931, and hereby referred to and made a part hereof, the subject matter of this litigation will be wholly destroyed during the pendency of plaintiff's appeal and plaintiff will be effectually denied and deprived of its right of appeal from said order and decree, unless the said defendants and those acting for them or in their behalf or under their direction in the matter of making said sale and attempting to collect said judgment, be so enjoined and restrained from proceeding with said sale and from collecting or attempting to collect said judgment during the pendency of said appeal.

Your petitioner further shows that while the sale of said securities under said execution was originally set for the 5th day of August, 1931, at 10:00 o'clock A. M., such sale [211] has been postponed until the 14th day of August, 1931, at 10:00 o'clock A. M., at which time your petitioner is advised and so alleges the sale will be made, unless the said parties be restrained or enjoined as herein prayed.

That plaintiff offers to do equity and to furnish a good and sufficient bond by the Fidelity and Deposit Company of Maryland as surety (a corporation duly licensed and authorized to do busi-

ness as a surety company in the State of Idaho), to indemnify the said defendants and each of them against all loss, costs and damages that may be sustained by the defendants by reason of any such order restraining and enjoining the sale of said securities and the collection of said judgment during the pendency of said appeal, or a bond conditioned as the Court may deem proper for the protection of said defendants.

Your petitioner's application for such restraining order and injunction during the pendency of this appeal is based on the records and files in this action and upon the said affidavit of McKeen F. Morrow.

Your petitioner therefore further prays that an injunction or restraining order or an order in the nature of a supersedeas be issued, made and entered herein pending the final disposition of the cause and to preserve and protect the subject-matter of the litigation during the pendency of said appeal, and that the amount of the bond or securities to be furnished by your petitioner may be fixed by the order allowing this appeal.

Dated this 5th day of August, 1931.

RICHARDS & HAGA,
OLIVER O. HAGA,
McKEEN F. MORROW,
MARTIN & MARTIN,
FRANK MARTIN,
Solicitors for Plaintiff,
Residence: Boise, Idaho. [212]

U. S. District Court, District of Idaho. Filed Aug. 5, 1931. W. D. McReynolds, Clerk. By ————, Deputy.

[Title of Court and Cause—No. 1626.]

## ASSIGNMENT OF ERRORS.

Now comes the American Surety Company of New York, plaintiff herein, by its solicitors, and, having presented an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the decree made and entered herein on the 1st day of August, 1931, dismissing plaintiff's bill of complaint and its suit and from the order made on said 1st day of August, 1931, denying plaintiff's motion for a preliminary injunction in this cause and striking certain portions of plaintiff's bill of complaint, says that said decree and order are erroneous and unjust to plaintiff, and particularly in this:

1. Because the Court erred in dismissing plaintiff's bill of complaint herein and its said suit.

2. Because the Court erred in making and entering a decree dismissing plaintiff's bill and suit with prejudice.

3. Because the Court erred in considering the matters set forth in defendant's showing in opposition to the motion for temporary injunction upon their motion to dismiss.

4. Because the Court erred in holding and deciding that the bill of complaint did not set forth any facts to entitle plaintiff to the relief prayed for, or to any equitable relief. [213]

5. Because the Court erred in holding and deciding in effect that the said judgment of the District Court of Ada County entered June 23, 1930, and the enforcement of which plaintiff sought to enjoin and restrain, did not deprive plaintiff of its property without due process of law, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States.

6. Because the Court erred in holding and deciding that an injunction, preliminary until final hearing in this cause should not issue, as prayed in said complaint.

7. Because the Court erred in refusing plaintiff a preliminary injunction, pending final hearing in this cause, restraining the above-named defendants, their agents, attorneys and assigns, from enforcing the collection of the above-mentioned judgment of June 23, 1930, and from selling or attempting to sell under execution issued upon said judgment the bonds and securities of the par value of $25,000.00 belonging to plaintiff and deposited with the state treasurer of the State of Idaho for the purpose of qualifying plaintiff to carry on the business of a surety company in said state.

8. Because the Court erred in sustaining the motion of defendants to strike from the bill of complaint in this cause certain portions specified in defendants' said motion and from striking from said complaint any matter whatsoever.

9. Because the Court erred in holding and deciding in effect that the issuance and levy of execution prevented injunctive relief in this suit.

10. Because the Court erred in holding and deciding in effect that the said judgment of June 23, 1930, was not void for lack of jurisdiction of the person of this plaintiff, American Surety Company of New York.

11. Because the Court erred in holding and deciding [214] in effect that the said judgment of June 23, 1930, was not void for want of power of said Court to give the judgment rendered against this plaintiff.

12. Because the Court erred in not holding and deciding that the said judgment of June 23, 1930, was unconscionable and inequitable and that the enforcement thereof should be enjoined and restrained and plaintiff afforded an opportunity to present its defense thereto prior to the entry of such judgment.

13. Because the Court erred in not holding and deciding that the entry of said judgment of June 23, 1930, was procured by constructive or legal fraud upon the plaintiff and upon the Court that entered said judgment.

14. Because the Court erred in holding and deciding in effect that this suit was an attempt to secure a review of judicial errors made or claimed to have been made by the Supreme Court of the State of Idaho and by the District Court of said State that entered said judgment.

15. Because the Court erred in holding and deciding in effect that actual fraud, accident or mistake were necessary conditions to relief in equity against the enforcement of the said unconscionable

and inequitable judgment obtained against plaintiff wholly without any fault or negligence on its part.

16. Because the Court erred in holding and deciding that it was prevented by the principals of comity between courts from granting the injunction prayed for, or any other equitable relief in this suit.

17. Because the Court erred in holding and deciding that plaintiff's bill should be dismissed for the reason that plaintiff had a plain, speedy and adequate remedy at law.

18. Because the Court erred in holding and deciding [215] in effect that plaintiff had an adequate remedy by appeal from said judgment of June 23, 1930.

19. Because the Court erred in not holding and deciding that said judgment of June 23, 1930, was void for the reason that the same was entered at Chambers and not in open court.

20. Because the Court erred in holding and deciding that the District Court for Ada County had jurisdiction to enter the judgment of June 23, 1930, in favor of defendants and against plaintiff herein.

WHEREFORE, plaintiff prays that said decree of August 1, 1931, be reversed and set aside and that the said order denying plaintiff's motion for a preliminary injunction and striking from plaintiff's bill of complaint the portions thereof particularly set out in defendants' motion to strike be likewise annulled, reversed and set aside, and that the District Court be directed to proceed with the

cause and to grant a preliminary injunction until final hearing.

RICHARDS & HAGA,
OLIVER O. HAGA,
McKEEN F. MORROW,
MARTIN & MARTIN,
FRANK MARTIN,
Solicitors for Plaintiff.
Residence: Boise, Idaho. [216]

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U. S. District Court, District of Idaho. Filed Aug. 5, 1931. W. D. McReynolds, Clerk. By ————, Deputy.

[Title of Court and Cause—No. 1626.]

## ORDER ALLOWING APPEAL.

The petition of American Surety Company of New York, plaintiff in the above-entitled cause, for an appeal from the final decree made and entered herein on August 1, 1931, dismissing plaintiff's bill of complaint and suit and from the order made and entered on said date denying plaintiff's motion for a preliminary injunction and granting defendants' motion to strike certain portions of the bill of complaint, is hereby granted and the appeal allowed as prayed for, upon plaintiff filing a bond for costs on appeal in the sum of Five Hundred Dollars ($500.00), with good and sufficient sureties to be approved by the Court.

Plaintiff's petition for an order restraining and enjoining the defendants, their attorneys and agents,

from selling plaintiff's securities during the pendency of the appeal or collecting or attempting to collect the judgment entered against plaintiff on June 23, 1930, as prayed in the petition for appeal, is denied for the reasons stated in the memorandum opinion filed on August 5, 1931.

IT IS FURTHER ORDERED that a certified transcript of the record and all proceedings be transmitted to the Circuit Court of Appeals for the Ninth Circuit as required by law and the rules of this Court and of the Circuit Court of Appeals.

Dated this 5th day of August, 1931.

CHARLES C. CAVANAH,
District Judge. [217]

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U. S. District Court, District of Idaho. Filed Aug. 5, 1931. W. D. McReynolds, Clerk. By ————, Deputy.

[Title of Court and Cause—No. 1626.]

## BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS, that we, American Surety Company of New York, as principal, and Fidelity and Deposit Company of Maryland, as surety, are held and firmly bound unto the defendants named in the above-entitled cause in the just and full sum of Five Hundred and no/100 Dollars ($500.00), for the payment of which, well and truly to be made, we bind ourselves, and each of us, and our, and each of our, successors and assigns, firmly by these presents.

SEALED with our seals and dated this 5th day of August, 1931.

The condition of this obligation is such, that,

WHEREAS, the above-named American Surety Company of New York, plaintiff, has prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from that interlocutory order and that certain decree, both made and entered in the above-entitled court and cause on the 1st day of August, 1931,—

NOW, THEREFORE, if the above-named plaintiff, American Surety Company of New York, shall prosecute its said appeal to effect and answer all costs if it shall fail to sustain its said appeal, then the above obligation shall be void; otherwise [218] the same shall be and remain in full force and virtue.

IN WITNESS WHEREOF, the said principal has caused its name to be hereunto subscribed by one of its attorneys of record, and the said surety has caused its name to be hereunto subscribed and its corporate seal affixed by its duly authorized agent and attorney-in-fact the day and year first above written.

AMERICAN SURETY COMPANY OF NEW YORK.

By RICHARDS & HAGA,

Attorneys of Record.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND.

By FRANK T. WYMAN,

Attorney-in-fact.

WALTER S. BRUCE,

Agent.

Countersigned:

[Seal] WALTER S. BRUCE
Resident Agent.

Approved.

CHARLES C. CAVANAH,
District Judge. [219]

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U. S. District Court, District of Idaho. Filed Aug. 5, 1931. W. D. McReynolds, Clerk. By ————, Deputy.

[Title of Court and Cause—No. 1626.]

## CITATION.

United States of America,
District of Idaho,—ss.

To Vivian F. Baldwin and E. R. Baldwin, GREETINGS:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the city of San Francisco, State of California, within thirty (30) days from the date of this writ, pursuant to an appeal filed in the Clerk's office of the District Court of the United States for the District of Idaho, Southern Division, wherein American Surety Company of New York is appellant and you are appellees, to show cause, if any there be, why the order and decree in said appeal mentioned should not be corrected and speedy justice should not be done to the parties in this behalf.

WITNESS, the Honorable CHARLES C. CAVANAH, United States District Judge for the District of Idaho, this 5th day of August, A. D. 1931, and of the Independence of the United States the One Hundred and Fifty-sixth.

CHARLES C. CAVANAH,
District Judge.

[Seal] Attest: W. D. McREYNOLDS,
Clerk.
By Dorothy G. Wylie,
Deputy.

Service of the foregoing citation and receipt of a copy thereof is hereby admitted this 5th day of August, 1931.

JAMES F. AILSHIE, Jr.,
J. R. SMEAD,
Solicitors for Vivian E. Baldwin and E. R. Baldwin. [220]

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U. S. District Court, District of Idaho. Filed Aug. 5, 1931. W. D. McReynolds, Clerk. By ————, Deputy.

[Title of Court and Cause—No. 1626.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To W. D. McReynolds, Clerk of the Above-entitled Court:

You are hereby requested to prepare a transcript of the record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to the appeal of the above-named plaintiff taken in the

above-entitled cause from that certain order and that certain decree made and entered herein on the first day of August, 1931, such record to consist of the following:

1. Bill of complaint.
2. Motion for temporary injunction.
3. Stipulation, filed July 9, 1931.
4. Defendants' showing in opposition to motion for temporary injunction, consisting of a list of the various documents filed and certain papers filed therewith, designated by the Clerk as defendants' showing No. 1 to No. 4, inclusive, and being, respectively; No. 1, certified copy of printed transcript on appeal in the case of Vivian F. Baldwin and E. R. Baldwin, Plaintiffs, vs. Ed. Anderson and American Surety Company of New York, Defendants; No. 2, affidavits of Charles F. Koelsch and others, notice of levy on execution, notice of sheriff's sale, writ of execution, remittitur from Supreme Court of Idaho, and copy of opinion of Supreme Court of Idaho; No. 3, court reporter's transcript; No. 4, various [221] papers from the records and files of Case No. 11,860 in the District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada.
5. Motion to dismiss.
6. Motion to strike.
7. Counter-affidavit of McKeen F. Morrow, with exhibits thereto attached, filed July 25, 1931.
8. Affidavit of Charles F. Koelsch, filed July 25, 1931.
9. Affidavit of James F. Ailshie, Jr., filed July 28, 1931.

10. Decision, filed July 31, 1931.

11. Order, filed August 1, 1931.

12. Decree, filed August 1, 1931.

13. Petition of plaintiff for an order to preserve the subject matter of the litigation pending appeal, and affidavit of McKeen F. Morrow in support of petition for injunction pending appeal, filed August 3, 1931.

14. Objections to application for injunction pending appeal, and affidavit of E. R. Baldwin, filed August 3, 1931.

15. Memorandum decision denying said petition.

16. Order denying said petition.

17. Certified copy of stipulation and order filed in State Court postponing sale, filed August 4, 1931.

18. All papers filed in connection with this appeal, to wit: Petition for appeal, assignment of errors, order allowing appeal, bond on appeal, citation, any stipulation filed herein as to the contents of the record, together with any additional files listed therein, and this praecipe, together with your certificate.

Said transcript to be prepared as required by law and the rules of this court and the rules of the United States Circuit Court of Appeals for the Ninth Circuit, and to be filed in the [222] office of the Clerk of said court as provided by law and the rules of this court and the Circuit Court of Appeals.

Dated this 5th day of August, 1931.

RICHARDS & HAGA,
MARTIN & MARTIN,
Solicitors for Plaintiff and Appellant.

Service of the above praecipe and receipt of a copy thereof is hereby admitted this 5th day of August, 1931.

JAMES F. AILSHIE, Jr.,
J. R. SMEAD,
Solicitors for Defendants and Appellees. [223]

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U. S. District Court District of Idaho. Filed Aug. 7,. 1931. W. D. McReynolds, Clerk. By ————, Deputy.

[Title of Court and Cause—No. 1626.]

## STIPULATION RE PRAECIPE AND WAIVING FILING OF COUNTER-PRAECIPE.

It is stipulated by and between counsel for the respective parties hereto that complainant's praecipe includes all of the records and files in the above-entitled cause, save and excepting the minutes of the court.

And it is further stipulated that in consideration of complainant's including in their record the Clerk's minutes of the proceedings had herein defendants waive the filing of a counter-praecipe.

RICHARDS & HAGA,
MARTIN & MARTIN,
Solicitors for Complainant.
JAMES F. AILSHIE, Jr.
J. R. SMEAD. [224]

CIVIL No. 1626.

AMERICAN SURETY COMPANY OF NEW YORK, a Corporation,

vs.

VIVIAN F. BALDWIN et al.

MINUTES OF COURT—AUGUST 1, 1931—TRIAL.

Comes now counsel for all of the parties hereto, appearing in open court, whereupon defendants moved the Court for the entering of orders sustaining motion to dismiss and motion to strike and denying complainant's motion for temporary injunction, which motion was by the Court granted and said orders duly signed and entered. Whereupon counsel for complainant waived time to further plead or amend their bill of complaint or to otherwise further plead, and thereafter counsel for defendants moved the Court to enter a final decree of dismissal, which motion was granted. [225]

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CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

I, W. D. McReynolds, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages numbered from 1 to 226, inclusive, to be full, true and correct copies of the pleadings and proceedings in the above-entitled cause, and that the same

together constitute the transcript of the record herein upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit as requested by the praecipe of the plaintiff together with the stipulation filed by the respective parties.

I further certify that the cost of the record herein amounts to the sum of $35.00, and that the same has been paid by the appellant.

WITNESS my hand and the seal of said court this 7th day of August, 1931.

[Seal] W. D. McREYNOLDS,
Clerk. [227]

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[Endorsed]: No. 6566. United States Circuit Court of Appeals for the Ninth Circuit. American Surety Company of New York, a Corporation, Appellant, vs. Vivian F. Baldwin and E. R. Baldwin, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the District of Idaho, Southern Division.

Filed August 10, 1931.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals for the Ninth Circuit.

AMERICAN SURETY COMPANY OF NEW YORK, a Corporation,

Appellant,

vs.

VIVIAN F. BALDWIN and E. R. BALDWIN,

Appellees.

## STATEMENT OF APPELLANT UNDER SUBDIVISION 8 OF RULE 23.

Comes now the above-named appellant and states that it intends to rely upon the errors specified in its assignment of errors included in the certified record herein, and further states that all of the record certified by the Clerk of the District Court of the United States for the District of Idaho, Southern Division is necessary for the consideration thereof except the following portions, to wit:

(a) Printed transcript in Supreme Court of Idaho, filed July 22, 1931, as Defendants' Showing No. 1, listed in appellant's praecipe as part of the documents specified in Paragraph 4.

(b) Petition of plaintiff and affidavit of McKeen F. Morrow, both filed August 3, 1931, listed in praecipe under Paragraph 13.

(c) Objections to application for injunction and affidavit of E. R. Baldwin, filed August 3, 1931, specified in praecipe under Paragraph 14.

(d) Memorandum decision denying said petition, specified in praecipe under Paragraph 15.

(e) Order denying said petition, specified in praecipe under Paragraph 16.

(f) Minutes of court, showing proceedings in this cause in the court below, included in record by stipulation of parties.

And pursuant to the provisions of said Rule 23 of this court, appellant requests that the papers and documents specifically listed above be omitted from the printed record on appeal herein, and further states that all of the papers and documents listed above are on file in the office of the Clerk of the United States District Court for the District of Idaho, Southern Division.

Dated this 14th day of August, 1931.

RICHARDS & HAGA,
MARTIN & MARTIN,
OLIVER O. HAGA,
Solicitors for Appellant.

Service of the above statement and receipt of a copy thereof is hereby admitted this 15th day of August, 1931.

JAMES F. AILSHIE, Jr.
J. R. SMEAD,
Solicitors for Appellees.

[Endorsed]: Filed Aug. 18, 1931. Paul P. O'Brien, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

AMERICAN SURETY COMPANY OF NEW YORK, a Corporation,

Appellant,

vs.

VIVIAN F. BALDWIN and E. R. BALDWIN,

Appellees,

APPELLEES' DESIGNATION OF ADDITIONAL PORTIONS OF RECORD UNDER SUBDIVISION 8 OF RULE 23.

Come now the above-named appellees, and referring to the document on file herein entitled "Statement of Appellant Under Subdivision 8 of Rule 23" designate the further portions of the certified record filed herein from the United States District Court for the District of Idaho, as properly to be included as a part of the record to be considered by this court on the final hearing of this cause, to wit:

(1) The following from the printed transcript on appeal, filed in the Supreme Court of the State of Idaho in the case of Baldwin et al. vs. American Surety Company of New York et al., a copy of which printed transcript is listed in appellant's praecipe, Paragraph 4 thereof, as No. 1 of defendant's showing in opposition to temporary injunction in the lower court herein:

(a) "Judgment" in the original action of Bald-

win et al. vs. Singer Sewing Machine Company and Ed Anderson, in the state District Court, which judgment appears in said transcript on appeal at pages 5, 6 thereof.

(b) "Notice of Appeal" from said judgment designated in (a) last above, found on pages 6, 7 of said transcript on appeal.

(c) "Notice of Motion," found on pages 21, 22 of said transcript on appeal.

(d) "Motion," appearing on pages 22–24 of said transcript on appeal. (This designation of said "Motion" is intended to exclude Exhibit "A," appearing on pages 25–27 of said transcript, because the same is elsewhere included in this record.)

(e) "Affidavit," the same being an affidavit of McKeen F. Morrow, found on pages 27–29 of said transcript on appeal.

(f) "Minutes of Proceedings of the District Court of the Third Judicial District of the State of Idaho, in and for Ada County," for August 12, 1930, appearing at pages 31, 32 of said transcript.

(g) "Notice of Appeal," appearing at pages 34, 35 of said transcript.

(h) Certificate of correctness of said transcript on appeal to said Supreme Court of Idaho, which appears in said transcript as follows: Commencing with the last two lines on the bottom of page 38 of said transcript and continuing thence to include also pages 39–41 thereof.

(2) Affidavit of E. R. Baldwin, filed August 3, 1931, included in appellant's praecipe in Paragraph 14 thereof.

(3) Clerk's minutes of proceedings herein in United States District Court for the District of Idaho, for August 1, 1931.

Appellees further state that all of the papers and documents hereinabove designated were filed herein in the said United States District Court for the District of Idaho, are now on file in said District Court and that the same are included in the certified copy of the records of said District Court in this cause, which was heretofore filed in this court.

Dated this 19th day of August, 1931.

JAMES F. AILSHIE, Jr.,
J. R. SMEAD,
Attorneys and Solicitors for Appellees.
Residence: Boise, Idaho.

Service of this above and foregoing designation, and receipt of a copy thereof, is hereby acknowledged this 19th day of August, 1931.

RICHARDS & HAGA,
MARTIN & MARTIN,
OLIVER O. HAGA,
Attorneys for Appellant.

[Endorsed]: Filed Aug. 22, 1931. Paul P. O'Brien, Clerk.

No. 6566

# United States

# Circuit Court of Appeals

## For the Ninth Circuit.

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AMERICAN SURETY COMPANY OF NEW YORK, a Corporation,

Appellant,

vs.

VIVIAN F. BALDWIN and E. R. BALDWIN,

Appellees.

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**Upon Appeal from the District Court of the United States for the District of of Idaho, Southern Division.**

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**PROCEEDINGS HAD IN THE**

**UNITED STATES CIRCUIT COURT OF APPEALS**

**FOR THE NINTH CIRCUIT.**

In the Circuit Court of Appeals for the Ninth Circuit.

AMERICAN SURETY COMPANY OF NEW YORK, a Corporation,

Appellant,

vs.

VIVIAN F. BALDWIN and E. R. BALDWIN,

Appellees.

## PETITION FOR ORDER TO PRESERVE THE SUBJECT MATTER OF THE LITIGATION PENDING APPEAL.

Appellant petitions this Honorable Court, and shows:

1. That on the 5th day of August, 1931, it perfected an appeal herein to the Circuit Court of Appeals for the Ninth Circuit from the United States District Court for the District of Idaho, Southern Division, under section 128 of the Judicial Code as amended (Sec. 225, Title 28, U. S. Code), and under section 129 of the Judicial Code as amended (Sec. 227, Title 28, U. S. Code), from a final decree dismissing appellant's bill of complaint against the said appellees and from an order denying appellant's motion for a preliminary injunction restraining the defendants, their agents, attorneys and assigns, and all acting under them or in their behalf, from collecting or attempting to collect during the pendency of the suit a certain judgment hereinafter more particularly described, and from selling or attempting to sell certain securities, the property

of appellant, of the par value of $25,000.00, deposited by appellant with the Treasurer of the State of Idaho pursuant to section 5104 of the Compiled Statutes of Idaho 1919, in order to qualify appellant to carry on its business as a surety company in said state.

2. That in its petition for appeal from said decree and order, appellant petitioned the said District Court and the Judge thereof to issue an order restraining the said appellees, as aforesaid, during the pendency of said appeal, in order that the subject matter of the litigation might be preserved and kept intact until the final disposition of the cause in this court, but the said District Court, conceiving itself to be without jurisdiction or power to issue such restraining order during the pendency of said appeal, allowed said appeal and approved appellant's bond for costs in the sum of $500.00, but refused and declined to issue any order protecting the subject matter of the litigation during the pendency of the appeal and restraining and enjoining the defendants, their agents, attorneys and assigns and others acting for them or in their behalf from attempting to collect the said judgment or from selling or attempting to sell on execution appellant's securities so deposited with the State of Idaho as aforesaid, all of which more fully appears from the memorandum decision filed by the Judge of said court on August 5, 1931, and made a part of the record submitted herewith.

3. That for the reasons aforesaid your petitioner is compelled to apply to this Honorable Court and

the Judges thereof for said order so restraining and enjoining the defendants, their agents, attorneys and assigns, and for the preservation of the subject matter of the litigation during the pendency of said appeal.

4. That, briefly stated, the facts upon which said suit is based are as follows:

(a) That on or about the 31st day of May, 1928, the said Vivian F. Baldwin and E. R. Baldwin recovered a judgment in the District Court of the Third Judicial District of the State of Idaho, in and for Ada County, against one Ed Anderson and Singer Sewing Machine Company, a corporation, in the sum of $19,500.00, and costs of action.

(b) That thereafter and about the 27th day of August, 1928, the said Ed Anderson and the said Singer Sewing Machine Company, through their respective attorneys, appealed from said judgment to the Supreme Court of the State of Idaho; that said Anderson gave an undertaking for costs only on said appeal, but the said Singer Sewing Machine Company, being desirious of staying all proceedings against it on said judgment pending the determination of said appeal, applied to appellant, American Surety Company of New York, for a supersedeas bond or undertaking on said appeal in the sum of $25,000.00, to be executed for and on behalf of said Singer Sewing Machine Company, but not on behalf of the said Anderson.

(c) That in accordance with the request of said Singer Sewing Machine Company, this appellant executed such bond for the sole benefit of said Singer Sewing Machine Company and for the sole

purpose of staying proceedings against said Singer Sewing Machine Company on said judgment pending said appeal.

(d) That thereafter and about the 10th day of April, 1930, the Supreme Court of the State of Idaho rendered its decision in said appeal and held, as shown by the decision of said court reported in 49 Idaho Reports, pages 231 to 339, inclusive, that said Singer Sewing Machine Company was not liable to the said Vivian F. Baldwin and E. R. Baldwin, and the judgment as against said Company was set aside with costs in its favor, and the said Singer Sewing Machine Company was thereafter, to wit: On the 24th day of May, 1930, by the said District Court of the Third Judicial District of the State of Idaho, dismissed from said suit, and judgment entered in its favor against the appellees herein for costs in the sum of $488.55.

(e) That thereafter, to wit: On June 23, 1930, said District Court or the Judge thereof at Chambers, at the request of one of the attorneys for the appellees herein, but without any notice to appellant, entered judgment against appellant on said bond for the sum of $22,357.21, because of the failure or default of said Ed Anderson to pay the said judgment so obtained against him by appellees but which had been set aside and vacated as against the said Singer Sewing Machine Company, in whose behalf said bond was given.

(f) That thereafter and on the 12th day of August, 1930, said District Court of the Third Judicial District of the State of Idaho, in and for

Ada County, vacated and set aside the judgment so entered against appellant on the ground and for the reason that said appellant was not surety for said Ed Anderson and was not liable under said bond for his default or failure to pay said judgment.

(g) That an appeal was thereafter taken from said order so vacating and setting aside said judgment by the appellees herein to the Supreme Court of the State of Idaho, and thereafter on the 2d day of May, 1931, the Supreme Court of the State of Idaho reversed said order so made on the 12th day of August, 1930, by said District Court vacating and setting aside said judgment on the ground that said District Court was without power or authority to vacate and set aside said judgment by motion to vacate, and that appellant's remedy was not by motion to vacate, but by appeal from said judgment, and said Supreme Court held that it was without power to construe said undertaking or bond on the appeal so taken from the order vacating said judgment and declined to determine whether said judgment against appellant had been legally or properly taken and whether judgment could be entered against appellant on said undertaking because of the default or failure of said Ed Anderson to pay said judgment.

(h) That thereafter a petition for rehearing was filed by appellant and denied by said Supreme Court on or about the 2d day of June, 1931, and the remittitur of said Supreme Court filed in said District Court on June 3, 1931.

(i) That thereafter and on June 17, 1931, appellees caused execution to issue upon said judgment and caused said execution to be levied upon $25,000.00, par value, United States Fourth Liberty Loan Bonds bearing 4¼% interest, long prior thereto deposited by appellant with the Treasurer of the State of Idaho for the purpose of qualifying appellant to do and carry on a surety business in said state; that such execution was placed in the hands of the sheriff of Ada County at the direction of the attorneys for appellees, and said sheriff noticed said securities for sale on the 5th day of August, 1931, at 10:00 o'clock A. M. at the front door of the courthouse in Boise, Ada County, Idaho; that said sale has since been postponed to 10:00 o'clock A. M., August 14, 1931.

(j) That the proceeds from the sale of said securities will, as appellant is informed and believes and so alleges the fact to be, be paid over to appellees herein and applied by them in satisfaction of the judgment which said appellees hold against said Ed Anderson, and such money will be disbursed by appellees and paid out to their creditors and otherwise spent and disposed of.

(k) That appellees are insolvent and this appeal will be wholly ineffectual and futile if the said securities be sold on the 14th day of August, 1931, as now proposed by appellees, or at any time prior to the final determination of this appeal, by the sheriff of Ada County, Idaho, who acts in such matter under the direction of said appellees and their attorneys.

5. That appellant believes it has a good, valid and meritorious defense to said judgment so entered against it without notice as aforesaid, and it has no plain, speedy or adequate remedy at law, and it will be deprived of its right of appeal and of its property without due process of law, and it will be required to pay a judgment which it believes to be most unconscionable, inequitable and unjust and which was entered against it as aforesaid without notice.

6. Your petitioner begs to refer, for a more complete statement of the facts and of the matters that have transpired prior to this petition in connection with said judgment and appellant's effort to obtain justice, to the record on appeal now on file with the Clerk of this Honorable Court.

7. Appellant offers to do equity and to furnish a good and sufficient bond by the Fidelity and Deposit Company of Maryland as surety (a corporation duly licensed and authorized to do business as a surety company in the State of Idaho and to execute bonds in this court), to indemnify the said appellees and each of them against all losses, costs and damages that may be sustained by appellees by reason of any order restraining and enjoining the sale of said securities and the collection of said judgment during the pendency of said appeal, or a bond conditioned as this Honorable Court or a Judge thereof may deem proper for the protection of said appellees.

Your petitioner therefore prays that an injunction or restraining order, or an order in the nature

of a supersedeas, be issued, made and entered herein pending the final disposition of this cause and to preserve and protect the subject matter of the litigation during the pendency of said appeal.

Dated this 6th day of August, 1931.

OLIVER O. HAGA,
McKEEN F. MORROW,
FRANK MARTIN,
Solicitors for Appellant.
Residence: Boise, Idaho.

United States of America,
District of Idaho,
County of Ada,—ss.

Oliver O. Haga, being first duly sworn, deposes and says: That he is one of the attorneys for the American Surety Company of New York, appellant in the above-entitled cause, and that he makes this verification for and on behalf of said appellant for the reason that he is more familiar with the facts set forth in said petition than are any of the officers of said appellant and for the further reason that none of appellant's officers reside in or are now within the State of Idaho or in Ada County, said state, where this affiant resides; that he has personal knowledge of the facts set forth in the foregoing petition, except such facts as are stated or alleged to be on information and/or belief; that he has obtained his said knowledge and information from an examination of the official records of the courts referred to in said petition in the actions and causes mentioned in said petition and from an examnation of original files and records of appellant relative

to said bond or undertaking; that he has read said petition and that the facts therein stated are true of affiant's own knowledge, except the facts stated or alleged to be on information and/or belief, and as to such facts he believes them to be true.

OLIVER O. HAGA.

Subscribed and sworn to before me this 6th day of August, 1931.

[Seal] H. M. JEFFREY,
Residence: Boise, Idaho.

Service of the foregoing petition and receipt of copy thereof with notice that the same will be presented to the Circuit Court of Appeals for the Ninth Circuit or a Judge thereof at Chambers on August 10, 1931, at 10:30 o'clock A. M., or as soon thereafter as counsel can be heard.

JAMES F. AILSHIE, Jr.,
J. R. SMEAD,
Solicitors for Appellees.

[Endorsed]: Petition for Order to Preserve the Subject Matter of the Litigation Pending Appeal. Filed Aug. 10, 1931. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 6566.

AMERICAN SURETY COMPANY OF NEW YORK, a Corporation,

Appellant,

vs.

VIVIAN F. BALDWIN and E. R. BALDWIN,

Appellees.

MOTION OF APPELLEES TO DISMISS.

Come now the appellees and move this Honorable Court and the Honorable William H. Sawtelle, one of the Judges thereof, to dismiss appellant's application for temporary restraining order pending appeal upon each and every of the grounds set forth in appellees' motion to dismiss appellant's bill of complaint filed in the District Court of the United States for the District of Idaho, and certified to the Clerk of this court and now on file herein.

JAMES F. AILSHIE, Jr.,
J. R. SMEAD,
Solicitors for Appellees.

[Endorsed]: Motion of Appellees to Dismiss. Filed Aug. 10, 1931. Paul P. O'Brien, Clerk.

At a stated term, to wit, the October Term, A. D. 1930, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the tenth day of August, in the year of of our Lord one thousand nine hundred and thirty-one. Present: Honorable WILLIAM H. SAWTELLE, Circuit Judge, Presiding; Honorable A. F. ST. SURE, District Judge.

[Title of Cause.]

ORDER OF SUBMISSION ON MOTION FOR ORDER TO PRESERVE SUBJECT MATTER PENDING APPEAL, ETC.

ORDERED petition of appellant for order to preserve subject matter of suit pending appeal, this day filed, argued by Mr. Oliver A. Haga, counsel for the appellant, and in support of said petition, and by Mr. James F. Ailshie, Jr., counsel for appellees, and in opposition to said petition, and submitted to Wilbur and Sawtelle, Circuit Judges, and St. Sure, District Judge.

Upon application of counsel for appellees, IT IS ORDERED that leave be granted said counsel to file motion to dismiss.

FURTHER ORDERED, pursuant to oral stipulation of counsel for the respective parties, that the sale of the securities mentioned in the petition may be postponed to August 15th at 11:00 o'clock A. M.

In the District Court of the Third Judicial District of the State of Idaho, in and for Ada County.

VIVIAN F. BALDWIN and E. R. BALDWIN,
Plaintiffs,

vs.

ED ANDERSON and AMERICAN SURETY COMPANY OF NEW YORK, a Corporation,
Defendants.

STIPULATION POSTPONING SALE OF CERTAIN SECURITIES, ETC., IN CIRCUIT COURT OF MONTANA.

IT IS HEREBY STIPULATED AND AGREED, by and between the plaintiffs and the defendants Ed. Anderson and American Surety Company of New York, that the sale of certain securities belonging to the American Surety Company of New York, heretofore noticed by the sheriff of Ada County, Idaho, for August 14, 1931, shall be postponed until the 15th day of August, 1931, at the hour of 11:00 o'clock A. M.

This stipulation is made by all parties without waiver of any rights on behalf of any of them except as to the continuance of said sale.

Dated this 10th day of August, 1931.

JAMES F. AILSHIE, Jr.,
J. R. SMEAD,
Attorneys for Plaintiffs.

_____,
Attorney for Defendant E. Anderson.

RICHARDS & HAGA,
Attorneys for Defendant, American Surety Co. of New York.

Certified as correct.

O. O. HAGA.
JAMES F. AILSHIE, Jr.

[Endorsed]: Copy of Stipulation Postponing Sale of Certain Securities, etc., in Circuit Court of Montana. Received Aug. 10, 1931. Paul P. O'Brien, Clerk.

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At a stated term, to wit, the October Term, A. D. 1930, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Friday, the fourteenth day of August, in the year of our Lord one thousand nine hundred and thirty-one. Present: Honorable A. F. ST. SURE, District Judge, Presiding; Honorable HAROLD LOUDERBACK, District Judge.

[Title of Cause.]

ORDER GRANTING PETITION FOR TEMPORARY INJUNCTION AND RESTRAINING ORDER, ETC.

Upon consideration of the petition of appellant for issuance of writ of injunction and/or restraining order directed to the sheriff of Ada County, Idaho, and of the papers filed in the case by counsel for respective parties, and good cause therefor appearing, and by direction of the Court,—

IT IS ORDERED that the writ of injunction and restraining order issue as prayed for upon the giving of supersedeas bond in the sum of Thirty Thousand Dollars ($30,000.00).

(WILBUR, Circuit Judge, did not participate in this matter.)

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NEW YORK CASUALTY COMPANY.

In the Circuit Court of Appeals for the Ninth Circuit.

AMERICAN SURETY COMPANY OF NEW YORK, a Corporation,

Appellant,

vs.

VIVIAN F. BALDWIN and E. R. BALDWIN,

Appellees.

BOND.

KNOW ALL MEN BY THESE PRESENTS, That we, American Surety Company of New York, a corporation, as principal, and New York Casualty Company, a corporation, as surety, are held and firmly bound unto Vivian F. Baldwin and E. R. Baldwin in the full and just sum of Thirty Thousand Dollars ($30,000), to be paid to the said Vivian F. Baldwin and E. R. Baldwin, their heirs, executors, administrators or assigns, which payment well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 10th day of August, 1931.

WHEREAS, the said American Surety Company of New York is appellant and the said Vivian F. Baldwin and E. R. Baldwin are appellees in said cause now pending in the United States Circuit Court of Appeals for the Ninth Circuit on appeal from the District Court of the United States for the District of Idaho, Southern Division, from a decree dismissing appellant's bill and an order denying appellant's motion for a preliminary injunction against appellees, and the said appellant having petitioned the said United States Circuit Court of Appeals of the Ninth Circuit for an order restraining and enjoining the said appellees, Vivian F. Baldwin and E. R. Baldwin, their agents, servants, employees and attorneys, and those acting for them or under their order or direction, or in active con-

cert or participation with them, or either of them, from collecting or attempting to collect during the pendency of said appeal a certain judgment obtained by said appellees against said appellant in the District Court of the Third Judicial District of the State of Idaho, in and for Ada County, on the 23d day of June, 1930, for $22,357.21, together with costs and interest, and from selling or attempting to sell during the pendency of said appeal any of the bonds or securities of appellant deposited by it with the State Treasurer of the State of Idaho under Section 5104 of the Compiled Statutes of Idaho 1919 for the purpose of qualifying appellant to do and carry on a surety business in said state, and an order having been duly issued that appellees be so restrained and enjoined upon this undertaking being given and filed;

NOW, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, that if the appellant, American Surety Company of New York, shall until sixty (60) days after the final determination of this cause, maintain with the State Treasurer of the State of Idaho not less than $25,000 actual value of securities of the type and kind required to be deposited with said State Treasurer under Section 5104 of the Compiled Statutes of Idaho, 1919, free and clear of levy under any execution issued in any other cause, and shall pay all such costs and damages as may be incurred, suffered or sustained by appellees if it be found they have been wrongfully enjoined or restrained by the order so issued or by any writ that may be issued by said Court pursuant to said order, not exceeding the sum of Thirty Thou-

sand Dollars ($30,000), then the above obligation to be void, otherwise to remain in full force and effect.

AMERICAN SURETY COMPANY OF NEW YORK.

By R. D. WELDON,
Resident Vice-President.

[Seal] Attest: B. DUCRAY,
Resident Assistant Secretary.

NEW YORK CASUALTY COMPANY.

By BREWSTER CAMERON,
Resident Vice-President.

[Seal] Attest: L. T. PLATT,
Resident Assistant Secretary.

Bond approved August 14th, 1931.

A. F. ST. SURE,
Judge, U. S. Circuit Court of Appeals for Ninth Circuit (Pursuant to Designation).

State of California,
City and County of San Francisco.

On this tenth day of August, in the year one thousand nine hundred and thirty-one, before me, John McCallan, a notary public in and for said City and County, State aforesaid, residing therein, duly commissioned and sworn, personally appeared R. D. Weldon and B. Ducray, known to me to be the resident vice-president and resident assistant secretary respectively of the American Surety Company of New York, the corporation described in and that executed the within and foregoing instrument, and known to me to be the persons who executed the said instrument on behalf of the said corporation,

and they both duly acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office, in the said City and County of San Francisco, the day and year in this certificate first above written.

[Seal] JOHN McCALLAN,
Notary Public in and for the City and County of San Francisco, State of California.
My commission expires Apr. 12, 1933.

State of California,
City and County of San Francisco.

On this tenth day of August, in the year one thousand nine hundred and thirty-one, before me, John McCallan, a notary public in and for said City and County, State aforesaid, residing therein, duly commissioned and sworn, personally appeared Brewster Cameron and L. T. Platt, known to me to be resident vice-president and resident assistant secretary respectively of the New York Casualty Company, the corporation described in and that executed the within and foregoing instrument, and known to me to be the persons who executed the said instrument on behalf of the said corporation, and they both duly acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office, in the said City and County of San Francisco, the day and year in this certificate first above written.

[Seal] JOHN McCALLAN,
Notary Public in and for the City and County of San Francisco, State of California.
My commission expires April 12, 1933.

[Endorsed]: Bond. Filed Aug. 14, 1931. Paul P. O'Brien, Clerk.

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In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 6566.

AMERICAN SURETY COMPANY OF NEW YORK, a Corporation,

Appellant,

vs.

VIVIAN F. BALDWIN and E. R. BALDWIN,

Appellees.

## WRIT OF INJUNCTION.

United States of America,—ss.

The President of the United States of America, to Vivian F. Baldwin and E. R. Baldwin:

WHEREAS, at a hearing before the United States Circuit Court of Appeals for the Ninth Circuit, held at San Francisco, California, on the 10th day of August, 1931, on the verified petition of appellant for an order restraining appellees from committing certain acts during the pendency of the appeal herein, at which hearing the parties appeared by their counsel, and thereupon an order was made and entered restraining appellees from committing the acts hereinafter specified during the pendency of said appeal upon the condition that appellant shall until sixty (60) days after the final determination of this cause, maintain with the State Treasurer of the State of Idaho not less than Twenty-five

Thousand Dollars ($25,000) actual value of securities of the type and kind required to be deposited with said State Treasurer under Section 5104 of the Compiled Statutes of Idaho, 1919, free and clear of levy under any execution issued in any other cause, and shall file with this court a surety bond in the sum of Thirty Thousand Dollars ($30,000) conditioned as provided in said order, and

WHEREAS, the appellant has filed said bond with the Clerk of this court in the amount aforesaid and conditioned as required by said order and which said bond has been duly approved by a Judge of said court,—

NOW, THEREFORE, YOU, the said Vivian F. Baldwin and E. R. Baldwin, and your agents, servants, employees and attorneys, and those acting for you or under your order or direction or in active concert or participation with you, or either of you, be and you hereby are commanded, enjoined and restrained during the pendency of said appeal, or until the further order of the Court in the premises, as follows:

(a) From collecting or attempting to collect from appellant that certain judgment made and entered in the District Court of the Third Judicial District of the State of Idaho, in and for Ada County, in an action wherein you, the said appellees, were plaintiffs and one Ed Anderson and Singer Sewing Machine Company were defendants, which judgment bears date the 23d day of June, 1930, and is for the principal sum of $22,357.21, with interest and costs, and from harassing or annoying the said appellant with the collection or enforcement of said

judgment, or any part thereof, and from taking or receiving any moneys under said judgment, or in payment or satisfaction thereof, unless such payment be voluntarily made by appellant;

(b) From selling or attempting to sell under execution, whether heretofore or hereafter issued, upon said judgment or otherwise, appellant's bonds and securities of the par value of Twenty-five Thousand Dollars ($25,000) or any part thereof, deposited by appellant with the State Treasurer of the State of Idaho pursuant to the provisions of Section 5104 of the Compiled Statutes of Idaho, 1919, or otherwise, for the purpose of qualifying appellant to do and carry on a surety business in the State of Idaho, and from levying execution upon such securities and from permitting further proceedings under any execution heretofore issued and levied upon such bonds and securities, except to release such securities from levy under such execution and return the execution unsatisfied to the Court from which it issued.

That the failure of appellant to maintain and keep on deposit with the State Treasurer of the State of Idaho the said securities hereinbefore referred to, free and clear of levy under any execution issued in any other cause, shall be cause for vacating this writ.

WITNESS, The Honorable CHARLES EVANS HUGHES, Chief Justice of the United States, and the seal of this Court, this 14th day of August, 1931.

[Seal] PAUL P. O'BRIEN,
Clerk, United States Circuit Court of Appeals for the Ninth Circuit.

Let the foregoing writ issue.

A. F. ST. SURE,

Judge of the United States Circuit Court of Appeals for the Ninth Judicial Circuit (Pursuant to Designation).

Service of the foregoing writ of injunction and receipt of certified copy is hereby acknowledged this 17th day of August, 1931.

JAMES F. AILSHIE, Jr.,
J. R. SMEAD,

Attorneys for Appellees Vivian F. Baldwin and E. R. Baldwin.

Service of the foregoing writ of injunction and receipt of certified copy is hereby acknowledged this 17th day of August, 1931.

JOHN McGRATH,
Sheriff, Ada County, Idaho.

[Endorsed]: Writ of Injunction. Filed Sep. 8, 1931. Paul P. O'Brien, Clerk.

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In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 6566.

AMERICAN SURETY COMPANY OF NEW YORK, a Corporation,

Appellant,

vs.

VIVIAN F. BALDWIN and E. R. BALDWIN,

Appellees.

ORDER RESTRAINING APPELLEES DURING PENDENCY OF APPEAL.

This cause came on to be heard before the court upon the verified petition of appellant for an order restraining appellees from doing certain acts which it is alleged will destroy the subject matter of the litigation during the pendency of the appeal herein, and the parties have appeared by their counsel.

It has been made to appear from the petition and the record and files in the cause that appellant, American Surety Company of New York, has prosecuted an appeal to this court to reverse the decree of the United States District Court for the District of Idaho, Southern Division, dismissing its bill of complaint and denying its motion for a preliminary injunction against appellees; that said appeal was perfected on the 5th day of August, 1931, and the record on appeal filed in this court on the 10th day of August, 1931, and that the subject matter of this litigation will be destroyed during the pendency of the appeal and before the cause can be heard by this court, and that appellant's appeal will accordingly become futile and ineffectual, unless appellees be restrained and enjoined as hereinafter provided and as prayed by appellant.

IT IS THEREFORE ORDERED:

1. That appellant, American Surety Company of New York, shall until sixty (60) days after the final determination of this cause, maintain with the State Treasurer of the State of Idaho not less than Twenty-five Thousand Dollars ($25,000) actual

value of securities of the type and kind required to be deposited with said State Treasurer under sec. 5104 of the Compiled Statutes of Idaho, 1919, free and clear of levy under any execution issued in any other cause.

2. That upon said appellant filing a surety bond approved by this Court, or a Judge thereof, in the sum of Thirty Thousand Dollars ($30,000), conditioned that appellant shall maintain and keep on deposit with the State Treasurer of Idaho securities of the kind and to the amount provided in paragraph 1 hereof, free and clear of levy under any execution issued in any other cause, and shall pay all such costs and damages as may be incurred, suffered or sustained by appellees if it be found that they have been wrongfully enjoined or restrained, the said appellees Vivian F. Baldwin and E. R. Baldwin, their agents, servants, employees and attorneys, and those acting for them or under their order or direction, or in active concert or participation with them, or either of them, be and the same hereby are and each of them is enjoined and restrained during the pendency of said appeal or until the further order of the Court in the premises, as follows:

(a) From collecting or attempting to collect from appellant that certain judgment made and entered in the District Court of the Third Judicial District of the State of Idaho, in and for Ada County, in an action wherein the said appellees were plaintiffs and one Ed Anderson and Singer Sewing Machine Company were defendants, which judgment bears date the 23d day of June, 1930,

and is for the principal sum of $22,357.21, with interest and costs, and from harassing or annoying the said appellant with the collection or enforcement of said judgment, or any part thereof, and from taking or receiving any moneys under said judgment, or in payment or satisfaction thereof, unless such payment be voluntarily made by appellant;

(b) From selling or attempting to sell under execution, whether heretofore or hereafter issued, upon said judgment, or otherwise, appellant's bonds and securities of the par value of $25,000.00, or any part thereof, deposited by appellant with the State Treasurer of the State of Idaho pursuant to the provisions of section 5104 of the Compiled Statutes of Idaho, 1919, or otherwise, for the purpose of qualifying appellant to do and carry on a surety business in the State of Idaho, and from levying execution upon such securities and from permitting further proceedings under any execution heretofore issued and levied upon such bonds and securities, except to release such securities from levy under such execution and return the execution unsatisfied to the Court from which it issued.

3. That the failure of appellant to maintain and keep on deposit with the State Treasurer of the State of Idaho the said securities hereinbefore referred to, free and clear of levy under any execution issued in any other cause, shall be cause for vacating this order and the writ issued pursuant thereto.

4. That a writ of injunction issue under the seal of the Court in harmony with this order upon the approval of the bond tendered by appellant.

Dated August 14, 1931.

A. F. ST. SURE,

Presiding Judge of the United States Circuit Court of Appeals for the Ninth Circuit (Pursuant to Designation).

Service of the foregoing order restraining appellees during pendency of appeal, and receipt of certified copy is hereby acknowledged this 17th day of August, 1931.

JAMES F. AILSHIE, Jr.,
J. R. SMEAD,

Attorneys for Appellees Vivian F. Baldwin and E. R. Baldwin.

Service of the foregoing order restraining appellees during pendency of appeal, and receipt of certified copy is hereby acknowledged this 17th day of August, 1931.

JOHN McGRATH,
Sheriff, Ada County, Idaho.

[Endorsed]: Order Restraining Appellees During Pendency of Appeal. Filed Sep. 8, 1931. Paul P. O'Brien, Clerk.

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At a stated term, to wit, the October Term, A. D. 1931, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the fourteenth day of December, in the year of our Lord one thousand nine hundred

and thirty-one. Present: Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding; Honorable WILLIAM H. SAWTELLE, Circuit Judge; Honorable WILLIAM P. JAMES, District Judge.

[Title of Cause.]

ORDER OF SUBMISSION.

ORDERED above cause argued by Mr. Oliver O. Haga, counsel for the appellant, and by Mr. John R. Smead, counsel for the appellees, and submitted to the court for consideration and decision.

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At a stated term, to wit, the October Term, A. D. 1931, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the eighteenth day of January, in the year of our Lord one thousand nine hundred and thirty-two. Present: Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding; Honorable WILLIAM H. SAWTELLE, Circuit Judge; Honorable PAUL J. McCORMICK, District Judge.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF DECREE.

By direction of the Court, ORDERED that the typewritten opinion this day rendered by this court in above cause be forthwith filed by the Clerk and that a decree be filed and recorded in the minutes of this court in accordance with the opinion rendered.

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[Title of Court and Cause.]

OPINION U. S. CIRCUIT COURT OF APPEALS.

Upon Appeal from the District Court of the United States for the District of Idaho, Southern Division.

Before WILBUR and SAWTELLE, Circuit JJ., and JAMES, District J.

WILBUR, Circuit Judge.—This is an appeal from an order of the District Court denying an injunction *pendente lite* and dismissing appellant's bill in equity on the ground that the facts stated therein did not entitle appellant to relief. The bill prays for an injunction to prevent defendants, hereinafter referred to as appellees, from enforcing a judgment entered in their favor and against appellant for the sum of $22,357.21 in the District

Court for the Third Judicial District of the State of Idaho. The judgment in question was entered against appellant without notice upon a supersedeas bond given by it to stay execution pending an appeal to the Supreme Court of Idaho. It is unquestioned that such a judgment may be entered in that manner, if justified by the terms of the bond. It was expressly so held by this court in U. S. Fidelity & Guaranty Co. vs. Ft. Misery Highway District, 22 F. (2d) 369, with reference to such a bond also given in the state of Idaho. The controversy in this case arises out of the fact that there are two defendants in the action in which the supersedeas bond was given, the Singer Sewing Machine Company and one Ed Anderson who was claimed to be an employee of the Singer Sewing Machine Company in an action to recover damages for personal injuries. Judgment was rendered against both defendants in that action and an appeal was taken by both. The appeal of the Singer Sewing Machine Company was sustained and the judgment against it reversed, while the judgment against its co-defendant, Anderson, was affirmed. Thereafter the trial court, upon motion of the plaintiff therein, without any notice whatsoever to the surety company, appellant herein, entered a judgment against it for the full amount of the judgment against Anderson, together with interest and costs. Claim is made here by appellees that the supersedeas bond in question was given to stay the whole judgment against both defendants in that action and therefore that the entry of judgment against the surety company without notice was proper. On the other

hand, it is claimed by the surety company that the bond was given solely on behalf of the Singer Sewing Machine Company and that when the appeal of that company was successful its obligation upon the bond ceased. In view of this controversy we will hereinafter set out the bond in full. Immediately after the entry of the judgment against the appellant in the aforesaid action, appellant moved the District Court to vacate the judgment. The motion was granted and an order entered vacating the judgment. From this order an appeal was taken by the plaintiffs therein, appellees here, to the Supreme Court of Idaho, which court, reversed the order of the District Court setting aside the judgment against the appellant and reinstated the said judgment. (Baldwin vs. Anderson, 299 P. 341.) This decision was based on the proposition that the trial court had no jurisdiction to set aside its judgment under the circumstances and that the remedy of the surety company was by an appeal from the judgment. In the meantime, the period for appeal had expired under the Idaho statute, unless that period was tolled by the pendency of the proceeding to vacate the judgment and the appeal therefrom. After the decision by the Supreme Court of Idaho, holding that the order of the trial judge vacating the judgment was unauthorized, an appeal was taken from the judgment by the appellant herein, but unless the time for taking that appeal was tolled by the proceeding above mentioned it was too late. Appellant calls attention to a later decision rendered by the Supreme Court of Idaho in a similar case, holding that the pendency of pro-

ceedings to vacate a judgment and of an appeal from the order vacating the judgment did not toll the statute as to the time of appeal from the judgment itself and that an appeal taken after the expiration of the statutory period was too late. Mountain States Implement Co. vs. Arave, 2 P. (2d) 314.

Appellant has also filed a petition for a writ of certiorari in the Supreme Court of the United States to review the judgment of the Supreme Court of Idaho on the appeal from the order setting aside the judgment in question. At the time of this opinion the petition has not been acted on.

The supersedeas bond herein referred to is as follows:

"In the District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada.

VIVIAN F. BALDWIN and E. R. BALDWIN,
Plaintiffs,

vs.

SINGER SEWING MACHINE COMPANY, a Corporation, and ED ANDERSON,
Defendants.

UNDERTAKING ON APPEAL.

Whereas the defendant, Singer Sewing Machine Company, a corporation, in the above-entitled action has appealed to the Supreme Court of the State of Idaho from the judgment made and entered against it in the above-entitled action and in the above-entitled court in favor of the plaintiffs in

said action on the 31st day of May, 1928, for the sum of Nineteen Thousand Five Hundred ($19,-500) Dollars and for Seventy-three and 70/100 ($73.70) Dollars costs in said suit, making a total of Nineteen Thousand Five Hundred Seventy-three and 70/100 ($19,573.70) Dollars, and from the whole of said judgment;

And whereas, the said appellant, Singer Sewing Machine Company, a corporation, is desirious of staying the execution of said judgment so appealed from;

Now, therefore, the undersigned American Surety Company, a corporation authorized to, and doing business in the State of Idaho, in consideration of the premises and of such appeal on the part of said appellant, Singer Sewing Machine Company, a corporation, does hereby acknowledge itself firmly bound in the sum of Twenty-five Thousand ($25,-000.00) Dollars, gold coin of the United States, that if the said judgment appealed from, or any part thereof, be affirmed, or the appeal dismissed, the appellant will pay in gold coin of the United States of America, the amount directed to be paid as to which said judgment shall be affirmed, if affirmed only in part, and all damages and costs which may be awarded against the appellant upon the appeal, and that if the said appellant does not make such payment within thirty days from the filing of the remittitur from the Supreme Court in the court from which the appeal is taken, judgment may be entered on motion of the respondents in their favor and against the undersigned surety

for the said sum of Nineteen Thousand Five Hundred Seventy-three and 70/100 ($19,573.70) Dollars, together with the interest that may be due thereon and the damages and costs which may be awarded against the said appellant, Singer Sewing Machine Company, upon the appeal.

In witness whereof, the said American Surety Company has caused its name and seal to be attached hereto by its proper officers and agents at Boise, Idaho, this 28th day of August, 1928."

The Supreme Court of Idaho in passing upon the validity of the order of the District Court vacating the judgment against appellant herein refused to consider the question as to whether or not the supersedeas bond or undertaking applied only to such judgment as might be affirmed against the Singer Sewing Machine Company, or whether it applied to the entire judgment. The court in that regard stated as follows:

> "The question or issue presented was, did the Surety Company, in its undertaking, become a party liable for every part of the judgment appealed from which might be affirmed by the Supreme Court, or did it stipulate only as to such judgment or part thereof as might be affirmed against the Singer Sewing Machine Company? To answer this question the court must look to the bond. The issue required a construction of the bond as a whole. The trial court had jurisdiction of this question. It construed the bond in favor of appellants and against the Surety Company. It was not only

in that court's power, but it was its duty, to decide the question submitted. In re Clerf, (Wn.) 104 P. 622; Windfrey vs. Benton, (Okla.) 106 P. 853. Whether it decided right or wrong its decision was a judgment which could be reviewed for error, if there was error, only by this court on appeal. Bunnell and Eno etc. Co. vs. Curtis, *supra;* Taylor vs. Hulett, *supra;* Wyllie vs. Kent, *supra;* United States Nat. Bank vs. Eldredge, *supra.* On appeal the question could be re-examined. The undertaking cannot be examined and its legal effect as to this issue be determined by us on this appeal. We may consider it only in so far as to determine whether its wording is such that it afforded color or legal right in appellants to judgment. That is to say, whether appellants' motion presented a legitimate question and was not an imposition or fraud upon the court. We think, regardless of what our construction of the bond might be, it cannot be said appellants held no right to submit the question. Nor can it be said that such submission was a fraud upon the court and on that ground its judgment was void."

Justice Budge, however, dissented from the conclusion of the court and gave his view as to the proper interpretation of the bond in question. As we fully concur in the views expressed by Justice Budge with reference to the nature and effect of this bond, we quote as follows from his opinion:

"The supersedeas bond upon its face and throughout its contents shows clearly that it was given to stay execution upon the judgment and the whole thereof entered against the Sewing Machine Company. Anderson's name nowhere appears in the bond, and in order to uphold the judgment entered upon the supersedeas bond it becomes necessary for the court to read into the bond that it was given to stay execution of the judgment against Anderson as well as against the Sewing Machine Company. This the court has no authority to do. * * *

"It affirmatively appears from the condition of the bond as above set out that the bond was given solely for the purpose of staying execution against the Singer Sewing Machine Company, with the amount of the judgment payable only in the event the judgment against the Singer Sewing Machine Company or any part thereof be affirmed. If the judgment against the Sewing Machine Company had been affirmed in part the bond would be answerable to the extent of the affirmance."

The bond then was one given on behalf of the Singer Sewing Machine Company. Its stipulation, by its express terms and also as implied from the statute under which it was given, was an agreement that, in the event the judgment against the Singer Sewing Machine Company was affirmed, judgment might be entered against the surety without notice. There was no agreement that judgment could be entered against it without notice in any other event,

as was done in the case at bar. The surety agreed to stand good for the obligation of the Singer Sewing Machine Company if that obligation was affirmed by the Supreme Court of Idaho on appeal. But that court held that there was no obligation on the part of the Singer Sewing Machine Company, and reversed the judgment against it. By the ex parte judgment entered, the surety was called upon to answer for an entirely different obligation, that of Anderson.

It is said that a surety, by entering into the obligation upon its supersedeas bond, makes itself a party to the action and is bound by all subsequent proceedings, even though erroneously taken against it. This, to a certain extent, is true, as was held by this court in U. S. Fidelity & Guaranty Co. vs. Ft. Misery Highway District, 22 F. (2d) 369, *supra.* The difficulty here is that the agreement of the appellant, that a judgment should be entered against it without notice, was confined to a judgment in the event that the judgment against its principal was affirmed. It was reversed. In the absence of such affirmance there was no agreement or authority for entering a judgment *ex parte.* The waiver of notice applied only in the event that the judgment against the Singer Sewing Machine Company was affirmed.

In National Exchange Bank vs. Wiley, 195 U. S. 257, the Supreme Court had occasion to deal with a consent judgment which was entered without any notice whatever, under and pursuant to the terms of a promissory note providing that a judgment might be so entered. It was held that where the express terms of the note did not, in the view of

the Supreme Court, authorize the entry of a judgment by the payee after he ceased to be the holder thereof that the judgment was void and unenforceable. In that regard the Court stated as follows (p. 270):

> "But we are of opinion that that court had no authority or jurisdiction to render judgment against the obligors, if the National Exchange Bank had in fact sold the note and ceased before the commencement of that suit to own it or to be entitled to receive the proceeds to its own use. *I* was, in such case, in legal effect, a personal judgment without service of process upon the defendants and without their appearance in person or by an authorized attorney. The proceedings were wanting in due process of law. The obligors never consented to judgment by confession in favor of one who was not the owner of the note or entitled to receive its proceeds, and the warrant of attorney cannot be held to have authorized such a confession."

We think there is no distinction in principle between that case and the case at bar. In that case it was held that by the terms of the note the payor had not consented to a judgment by confession in favor of the payee after the payee had parted with title. Consequently, the judgment having been entered without actual notice to him it was void.

In the case of a supersedeas bond, although, as we have stated, the surety has frequently been referred to as a party to the action his relationship to the

case is not strictly that of a party. His relationship is fixed by the terms of the bond and the statute under which it is given. Giving the utmost effect to the decisions of the courts in that regard, they do not go further than to hold that the surety stands in the shoes of his principal. We are not dealing here with a case where a judgment is rendered erroneously by a court after it has acquired jurisdiction of the parties, but with one where it has not acquired jurisdiction of the surety, because the surety has neither waived notice nor been given notice.

It follows from what we have said that the judgment against the surety company was not only erroneous but wholly void as having been given without notice or hearing in violation of the federal constitution. National Exchange Bank vs. Wiley, 195 U. S. 257, *supra.* This view is inconsistent with the decision of the Supreme Court of Idaho, but the majority of the court there assumed upon the appeal in question that the surety was in court at the time of the hearing of the motion for judgment against it and that therefore the court not only had jurisdiction of the subject matter of the judgment but of the parties and that its decision, although erroneous, was not void. We would concur in this opinion if the premise were granted that the surety was in court at the time the trial court entered the judgment against it.

With reference to the remedy of appellant in the state courts by appeal or otherwise, appellant relies on the rule frequently stated by the federal courts, that the existence of a plain, speedy and adequate remedy in the state courts is no bar to the mainte-

nance of an action in equity in the federal courts. The rule is stated by this court in Franklin vs. Nevada-California Power Co., 264 F. 643, 645, as follows:

> " * * * the law is that the adequate remedy at law which is the test of equitable jurisdiction in the federal courts must exist in those courts. The fact of the existence of such a remedy in a state court is immaterial."

This rule was invoked by the Supreme Court in Simon vs. Southern Railway, 236 U. S. 115, upholding the jurisdiction of a federal court in equity where a judgment was obtained in a state court against the railroad company without notice to it. It is there said (p. 122):

> "Much more so will equity enjoin parties from enforcing those obtained without service. For in such a case the person named as defendant 'can no more be regarded as a party than any other member of the community.' Such judgments are not erroneous and not voidable but upon principles of natural justice, and under the due process clause of the Fourteenth Amendment, are absolutely void. They constitute no justification to a plaintiff who is concerned in executing such judgments is considered in law as a mere trespasser. * * *
>
> "On principle and authority, therefore, a judgment, obtanied in a suit of which the defendant, had no notice, was a nullity and the party against whom it was obtained was entitled to relief."

The same rule was applied in a more recent case by the Supreme Court, Risty vs. Chicago, R. I. & Pac. Ry. Co., 270 U. S. 378, where it was said (p. 388):

> "The remedy by appeal to the state court under § 8469 does not appear to be coextensive with the relief which equity may give. In any event, it is not one which may be availed of at law in the federal courts, and the test of equity jurisdiction in a federal court is the inadequacy of the remedy on the law side of that court and not the inadequacy of the remedies afforded by the state courts. Smyth v. Ames, 169 U. S. 466; Chicago, B. & Q. R. R. Co. vs. Osborne, *supra.*"

The rule was applied by the Circuit Court of Appeals for the Fourth Circuit in Firestone Rubber Co. vs. Marlboro Cotton Mills, 282 F. 811, where the equity jurisdiction of the federal court was invoked, by reason of diversity of citizenship, to restrain enforcement of a final judgment in a state court, obtained without proper service, notwithstanding the existence of a remedy in the state court, by petition to have the judgment set aside.

As we understand, the appellees do not question the jurisdiction of a federal court of equity to entertain the bill, notwithstanding the existence of the remedy in the state courts but contend that under the ordinary rules of equity procedure the federal court should refuse to take jurisdiction; or, otherwise stated, "having jurisdiction, refuse to entertain complainant's bill or to act in the premises," on the

ground of comity. In support of this contention appellees cite Gresham vs. Boston etc. R. R. Co., 14 F. 753; Denton vs. Baker, 93 F. 46; Strand vs. Griffith, 144 F. 828; Bower vs. Stone, 177 F. 673; Eggers vs. Krueger, 236 F. 852; Simonitsch vs. Bruce, 258 F. 331. None of these cases apply to a situation where the petitioner sought to avoid the effect of a judgment entered against it without due process of law. The difficulty in the case at bar is that appellant has not had its day in court. When it applied to the state district court to have the judgment vacated, it might have been bound by an adverse decision of that court if one had been rendered were it not for the fact, as subsequently determined by the Supreme Court of the state, that the District Court of the state had no jurisdiction to consider the question at all; that the Supreme Court of Idaho alone had jurisdiction to correct the error on appeal.

Appellees also contend that the pendency of its appeal to the Supreme Court of Idaho, and of its petition for a writ of certiorari to the Supreme Court, precluded the appellant from proceeding in equity in the federal court. But the rule is otherwise. Borden's Condensed Milk Co. vs. Baker, 177 F. 906, 911. The bill stated a cause of action for relief in equity.

Appellees object to the verification of the bill by one of the solicitors for the appellant. The verification recites the source of affiant's knowledge as:

> " * * * from the records and decisions of said court (District Court Third Judicial

District) and the Supreme Court of the State of Idaho and from other sources which be believes to be reliable; that he has read the above and foregoing complaint and believes the facts therein stated to be true."

Upon the hearing of the motion for an injunction, appellees presented copies of all the documents involved in the matter, covering about 160 pages of the transcript, and also affidavits of the appellees' attorney and by the trial judge affirmatively showing that the judgment in question was entered *without any notice whatsoever to the appellant,* upon the representation by appellees' attorney that such notice would be entirely unnecessary. If there is any defect in the verification of the bill as it affected the right to an injunction pendente lite it was cured by the appellees' evidence covering practically all of the allegations of the bill.

The temporary injunction should have been granted. The decree of dismissal and the order denying the application for a temporary injunction are reversed, and the trial court is directed to grant a temporary injunction as prayed for.

[Endorsed]: Opinion. Filed Jan. 18, 1932. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 6566.

AMERICAN SURETY COMPANY OF NEW YORK, a Corporation,

Appellant,

vs.

VIVIAN F. BALDWIN and E. R. BALDWIN,

Appellees.

DECREE U. S. CIRCUIT COURT OF APPEALS.

Appeal from the District Court of the United States for the District of Idaho.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Idaho, and was duly submitted.

On consideration whereof, it is now here ORDERED, ADJUDGED, AND DECREED by this Court, that the decree of dismissal and the order denying the application for a temporary injunction of the said District Court in this cause be, and hereby are, reversed, with costs in favor of the appellant and against the appellees, and that this cause be and hereby is remanded to the said District Court with directions to grant a temporary injunction as prayed for.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED by this Court, that the appellant

recover against the appellee for its costs herein expended, and have execution therefor.

[Endorsed]: Decree. Filed and entered Jan. 18, 1932. Paul P. O'Brien, Clerk.

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At a stated term, to wit, the October Term, A. D. 1931, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Tuesday, the twenty-third day of February, in the year of our Lord one thousand nine hundred and thirty-two. Present: Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding; Honorable WILLIAM H. SAWTELLE, Circuit Judge.

[Title of Cause.]

ORDER DENYING PETITION FOR A REHEARING AND PETITION FOR LEAVE TO ORALLY ARGUE PETITION FOR REHEARING.

Upon consideration of the petition of appellees, for a rehearing of above cause, and of the petition for leave to file motion for oral argument on petition for rehearing, and of the motion for oral argument on petition for rehearing, all filed on February 15, 1932, and good cause therefor appearing, IT IS ORDERED that the said petition for rehearing and motion for oral argument be, and each of them hereby is denied.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 6566.

AMERICAN SURETY COMPANY OF NEW YORK, a Corporation,

Appellant,

vs.

VIVIAN F. BALDWIN and E. R. BALDWIN,

Appellees.

## MOTION FOR STAY OF MANDATE.

Come now Vivian F. Baldwin and E. R. Baldwin, appellees above named, and respectfully move the Court that the issuance under Rule 32, of the mandate of this Court be stayed to and including the 1st day of April, 1932, and in the event a petition for writ of certiorari, to be made by the appellees herein, be docketed in the Clerk's office in the Supreme Court of the United States on or before said date then the mandate of this Court be stayed until after the Supreme Court of the United States passes upon said petition.

JAMES F. AILSHIE, Jr.
J. R. SMEAD,
Counsel for Appellees.
Residence: Boise, Idaho.

Filed Feb. 23, 1932. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 6566.

AMERICAN SURETY COMPANY OF NEW YORK, a Corporation,

Appellant,

vs.

VIVIAN F. BALDWIN and E. R. BALDWIN,

Appellees.

ORDER STAYING ISSUANCE OF MANDATE.

Upon application of Messrs. James F. Ailshie, Jr., and J. R. Smead, counsel for the appellees, and good cause therefor appearing, IT IS ORDERED that the issuance, under Rule 32, of the mandate of this Court in the above cause be, and hereby is stayed to and including April 1, 1932; and in the event the petition for a writ of certiorari to be made by the appellees herein be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the mandate of this Court is to be stayed until after the said Supreme Court passes upon the said petition.

CURTIS D. WILBUR,
United States Circuit Judge.

Dated: San Francisco, California, February 23, 1932.

Filed Feb. 23, 1932.

PAUL P. O'BRIEN,
Clerk.

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing two hundred and sixty-eight (268) pages, numbered from and including 1 to and including 268, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellees and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 27th day of February, A. D. 1932.

[Seal] PAUL P. O'BRIEN,
Clerk.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 25, 1932

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted, and the case is assigned for argument immediately following the argument in case No. 494, American Surety Co. vs. Baldwin.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1931.

No. ~~494~~ 3

AMERICAN SURETY COMPANY OF NEW YORK,
*Petitioner,*

—against—

VIVIAN F. BALDWIN and E. R. BALDWIN,
*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO.

WILLIAM MARSHALL BULLITT,
ALLAN C. ROWE,
*Counsel for Petitioner.*

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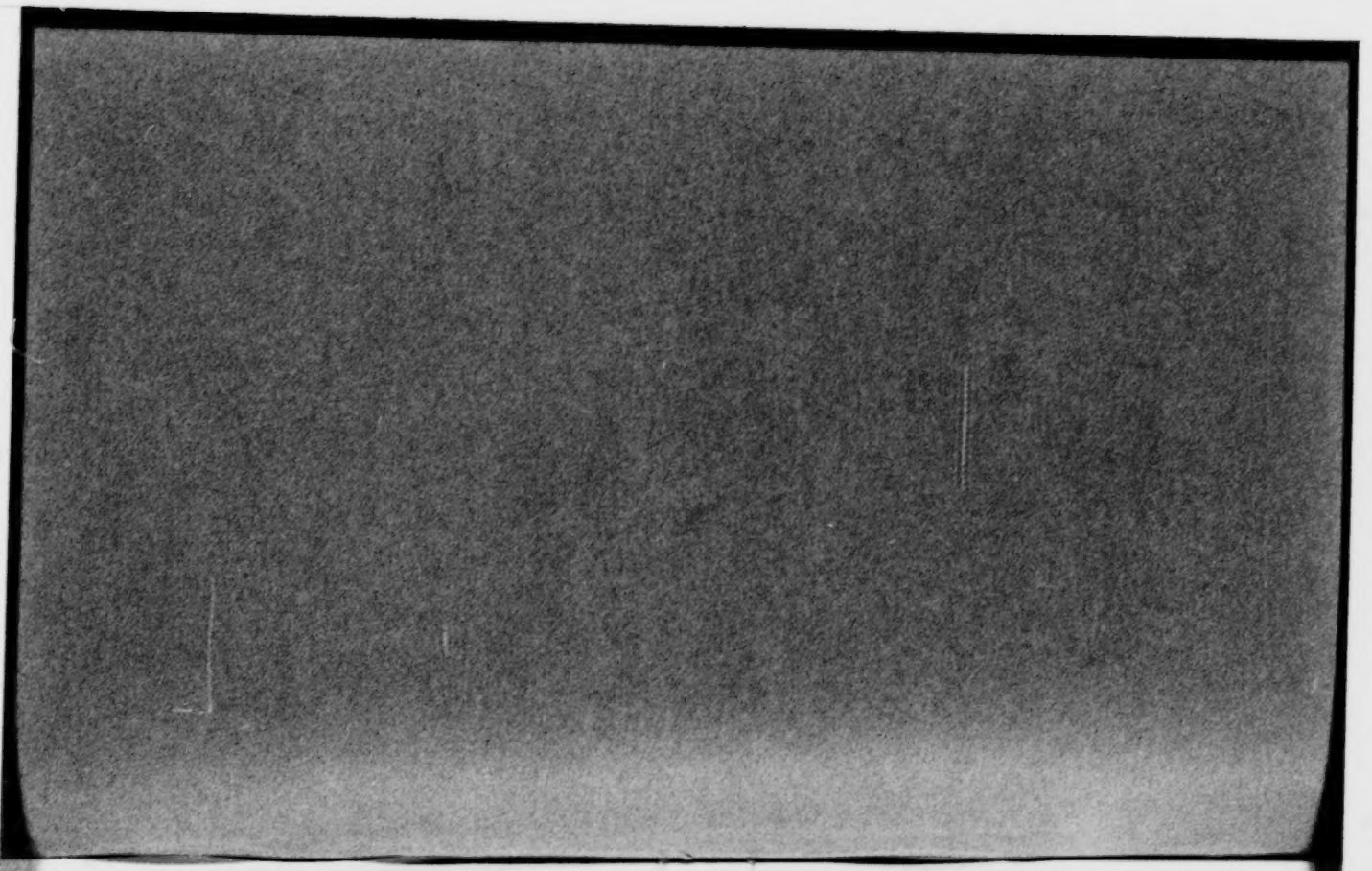

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1931.

No. .

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AMERICAN SURETY COMPANY OF NEW YORK,
Petitioner,

—against—

VIVIAN F. BALDWIN and E. R. BALDWIN,
Respondents.

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## Petition for Writ of Certiorari to the Supreme Court of Idaho.

*To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States.*

The American Surety Company of New York petitions for a writ of *certiorari* to review the Supreme Court of Idaho's judgment in *Baldwin* v. *Anderson,* 299 Pac. 341.

### Summary Statement of the Matters Involved.

The Baldwins recovered a $19,500 judgment against one Anderson and Singer Sewing Machine Company for an automobile collision; and both defendants appealed (R. 1, 3). The Singer Company superseded the judgment against it, with the American Surety Co. as surety on the supersedeas bond (R. 6). Anderson *did not supersede.*

On appeal the judgment was affirmed as to Anderson; but was reversed as to the Singer Company and the suit was dismissed as to it (R. 14, 15). (*Baldwin* v. *Anderson,* 49 Idaho 231.)

The lower state court, apparently inadvertently *and without notice to or process upon* the American Surety Co., entered up a $19,500 judgment against it on the supersedeas bond, as if it had been surety on a bond for Anderson (R. 18). As soon as the Surety Co. learned of such judgment, it moved to set it aside as void (R. 21); and the judgment was duly vacated (R. 33).

The Baldwins again appealed to the Supreme Court of Idaho; which held that the lower court, having once entered up a judgment against the Surety Co., had no power to vacate it (R. 46). The Idaho Supreme Court has thus reinstated the lower court's judgment against the Surety Co., with the result that the Surety Co. is now held liable for the $19,500 judgment against Anderson *which it never bonded;* and a judgment for $22,357.21 has been rendered against it, *without notice or process or an opportunity to defend.*

The Supreme Court of Idaho based its decision upon the theory that when the Surety Co. became surety on a supersedeas bond for one *successful* appellant, it automatically became such a party to the suit as to be bound by any kind of future judgment rightly or wrongly entered against it and rendered without notice or service of process, even on the question of its liability for the *defeated* appellant, for whom it had never become surety (R. 50, 51).

The Idaho Supreme Court declined to even consider the question of whether the Surety Co. did in fact become surety for Anderson on the supersedeas (R. 50).

The Court suggested that the Surety Co.'s sole remedy to test the question of whether it was in fact liable as supersedeas for Anderson was by appeal from the *ex parte* judgment. As the time to appeal had already expired when this suggestion was made, it did not afford any opportunity for a hearing on the merits.*

One of the justices dissented vigorously, declaring:

> "The bond upon its face, in unmistakable language, shows that it was given to stay execution against the Singer Sewing Machine Company and for no one else, and the court therefore had no authority to construe the bond to include the judgment against Anderson. The judgment against the surety company on the supersedeas bond was therefore void when entered, and was subject to attack by motion to, and was properly set aside.
>
> *No other result can follow from the holding of the majority than a miscarriage of justice, and it is repugnant to both the state and federal constitutions in that the surety company is deprived of its property without due process of law"* (R. 63).

**The Ground for the Allowance of the Writ.**

The Surety Co. has been deprived of its property without due process of law in violation of the 14th Amendment by a state court decision that is in conflict with the settled decisions of the Supreme Court of the United States.

---

* Judgment against petitioner on the supersedeas bond was entered June 23, 1930 (R. 18). The time to appeal therefrom expired ninety days thereafter (§7152 Idaho Compiled Statutes). The decision of the Idaho Supreme Court that petitioner's sole remedy was by appeal was not rendered until May 2, 1931 (R. 46).

## FIRST POINT.

### The judgment is void for lack of jurisdiction over the Surety Co.'s person.

The *mere execution* of a supersedeas bond which might involve the justiciable question of whether it covers Anderson as well as the Singer Co. did not make the Surety Co. such a party to the suit as to give the Idaho courts jurisdiction of the Surety Co.'s person to render an *ex parte* judgment determining this question.

In *National Exchange Bank* v. *Wiley*, 195 U. S. 257, the question involved was the validity of a judgment entered in another State (Ohio). The judgment was entered without process upon a confession executed in connection with a note. The Ohio judgment was attacked as void on the ground that the judgment exceeded the consent, *i. e.*, that the confession did not authorize the judgment because plaintiff was not the holder of the note. It was claimed that this defect was cured by an Ohio statute. This court held otherwise, declaring, Mr. JUSTICE HARLAN, p. 268:—

> "In other words, the defendant Wiley could show collaterally that he was not legally before the court—as he was not, in any just sense—if his appearance was entered and judgment confessed by one who had in fact, at the time, no authority to do either; and, consequently, that the court was without jurisdiction to proceed except on legal notice to him, or without his appearance in person or by an attorney authorized to represent him. *If law and usage in Ohio were to the contrary, then such law and usage*

*would be in conflict with the Constitution of the United States; for it is thoroughly settled that a personal judgment against one not before the court by actual service of process, or who did not appear in person or by an authorized attorney, would be invalid as not being in conformity with due process of law.*"

and also at page 270:—

"It was, in such case, in legal effect, a personal judgment without service of process upon the defendants, and without their appearance in person or by an authorized attorney. The proceedings were wanting in due process of law. The obligors never consented to judgment by confession in favor of one who was not the owner of the note or entitled to receive its proceeds, and the warrant of attorney cannot be held to have authorized such a confession."

In *Chicago Life Insurance Co.* v. *Cherry*, 244 U. S. 25, Mr. JUSTICE HOLMES said at page 29:—

"A court that renders judgment against a defendant thereby tacitly asserts, if it does not do so expressly, that it has jurisdiction over that defendant. But it must be taken to be established that a court cannot conclude all persons interested by its mere assertion of its own power (*Thompson* v. *Whitman*, 18 Wall 457) even where its power depends upon a fact and it finds the fact (*Tilt* v. *Kelsey*, 207 U. S. 43)."

The case at bar presents an exact parallel. Here, as in the *Wiley* case, the question in dispute is whether the instrument authorized an *ex parte* judgment under the conditions existing. In the *Wiley* case, this court

held that such a question could not be decided in Wiley's absence and that he could attack any judgment based thereon as void. In the instant case the Supreme Court of Idaho has held that the disputed question can be decided in the Surety Co.'s absence and that Surety Co. cannot attack it as void but must appeal.

**A court cannot acquire jurisdiction over the person by deciding ex parte that it has such jurisdiction, where a substantial question exists upon which the jurisdiction depends.**

## SECOND POINT.

### The Federal question was raised in due season.

Upon the rendition of the decision by the Idaho Supreme Court, petitioner promptly moved for rehearing and raised the constitutional question (R. 69).

In *Missouri ex rel. Missouri Ins. Co.* v. *Gehner,* 281 U. S. 313, this court has held that such practice was timely. A petition for *certiorari* to the United States Supreme Court was allowed. Mr. JUSTICE BUTLER said (p. 320):—

> "It is well settled that this court will not consider questions that were not properly presented for decision in the highest court of the State. Ordinarily it will not consider contentions first made in a petition to the state court for rehearing where the petition is denied without more. *Citizens Nat. Bank* v. *Durr,* 257 U. S. 99, 106. But here the company, at the first opportunity, invoked the protection of the Federal Constitution and statute. It could not earlier

have assailed the section as violative of the Constitution and laws of the United States.

The board of equalization completely eliminated the bonds from its calculations, and there is nothing in the language of the section to suggest that it authorizes any diminution of the amount of the deductible reserve and unpaid claims or an apportionment of such liabilities between taxable and non-taxable assets. It may not reasonably be held that the company was bound to anticipate such a construction or in advance to invoke Federal protection against the taxation of its United States bonds. Upon the facts disclosed by this record it is clear that appellant sufficiently raised in the highest court of the State the Federal questions here presented and is entitled to have them considered. *Saunders* v. *Shaw*, 244 U. S. 317, 320; *Ohio ex rel. Bryant* v. *Akron Metropolitan Park Dist.*, 281 U. S. 74 *ante*, 710."

Petitioner was not bound to anticipate in advance of the decision of the Supreme Court of Idaho, that it would declare the hitherto unheard of doctrine that the mere execution of a supersedeas bond for the Singer Co. (even if it presented the question whether the Surety Co. became surety for Anderson) amounted to a consent that such question be determined *ex parte* and prevented the Surety Co. from attacking the *ex parte* judgment as void for lack of jurisdiction.

WHEREFORE the American Surety Co. respectfully prays that a writ of *certiorari* issue out of this Court directed to the Supreme Court of Idaho to review its decision.

WILLIAM MARSHALL BULLITT,
ALLAN C. ROWE,
*Counsel for Petitioner.*

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DEC 1

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1931.

No. 3

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AMERICAN SURETY COMPANY OF NEW YORK,
Petitioner,

—against—

VIVIAN F. BALDWIN and E. R. BALDWIN,
Respondents.

---

## PETITIONER'S MEMORANDUM ON MOTION TO DISMISS CERTIORARI.

Petitioner frankly believes that there is no merit in its own appeal to the Supreme Court of Idaho, referred to at page 3 of Respondents' motion to dismiss*; but merely because the Idaho Supreme Court indicated petitioner's remedy was by way of appeal (R. 54), petitioner felt compelled to pursue such appeal, despite its apparent hopelessness. Such appeal has not yet been determined.

**Meanwhile, if no right of appeal is in fact available by reason of the Idaho Statute of Limitations, the time to present a petition for certiorari to this Court expired October 31, 1931.**

Petitioner was consequently compelled to present the petition for *certiorari* to this Court in order to preserve

petitioner's rights, in case this Court shall be of the opinion that the judgment sought to be reviewed thereby is final.

Respectfully submitted,

WILLIAM MARSHALL BULLITT,
ALLAN C. ROWE,
*Counsel for Petitioner.*

---

NOTE: The Idaho Statute of Limitations limits the period within which such appeal may be taken to 90 days (Sect. 7152 Idaho Compiled Statutes). The judgment was entered June 23, 1930 while the appeal was taken July 13, 1931. The Idaho Supreme Court has recently held that an order (subsequently reversed on appeal) vacating a judgment does not suspend the operation of the Idaho Statute of Limitations (*Mountain States Implement Co.* v. *Arave*, 2 Pac. (2) 314, not yet officially reported).

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# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. [redacted] 3

AMERICAN SURETY COMPANY OF NEW YORK,
*Petitioner,*

vs.

VIVIAN F. BALDWIN and E. R. BALDWIN,
*Respondents.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JAMES E. AILSHIE,
JAMES E. AILSHIE, JR.,
C. R. SMEAD,
*Counsel for Respondents.*

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# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1931**

## No. 494

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AMERICAN SURETY COMPANY OF NEW YORK,
*Petitioner,*

*vs.*

VIVIAN F. BALDWIN and E. R. BALDWIN,
*Respondents.*

---

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

---

### STATEMENT OF THE FACTS

The petitioner's purported statement of facts hardly reflects the record. It is rather a statement of petitioner's conclusions as to the proper construction and effect of its undertaking. We therefore feel obliged to re-state the facts.

Originally the lower state court entered a *joint* judgment against the Singer Sewing Machine Company and Anderson. No several liability was adjudged against either. (R. 1-2.)

The Singer Company and Anderson took a ***single, joint appeal*** to the Supreme Court of Idaho, by notice which recited that such appeal was from the *whole* of the judgment. (R. 3.) The American Surety Company, petitioner here, prepared, executed and filed in the lower court its supersedeas undertaking. This was done pursuant to *Section* 7155, *Idaho Compiled Statutes.* (Appendix, p. 14.)

Obviously, there was only one appeal from the judgment. In the preliminary recitals of its undertaking, the surety company referred to the appeal *as though* the Singer Company had taken it *alone.* As above shown, this recital was at variance with the record facts.

However, the undertaking went on to provide that the appeal to which it referred was in fact *from the whole of said judgment.* (R. 16.) This statement was correct, as shown above. Then, as the consideration to it for the obligation of said undertaking, the surety company called for a stay of execution of *said* judgment *so* appealed from. (R. 19.)

Thus, when the undertaking and the record to which it referred and which it accompanied were consulted together, it appeared rather plainly that the undertaking referred to a single, joint appeal from the *whole* of the joint judgment, and demanded that execution be stayed as to the whole judgment so appealed from.

The undertaking then went on to provide that if the said judgment, *or any part thereof*, should be affirmed, the surety company would be responsible for its payment. (R. 19.)

It was affirmed in part, as against Anderson. (R. 14.)

Thereafter, the statutory period of thirty days having passed without payment of the judgment, the judgment creditors, respondents here, proceeding in accordance with the terms of the statute and the provision in the supersedeas undertaking as well (R. 19, f. 21), moved the lower court, in which the undertaking reposed and to which the judgment of the Supreme Court had been remitted, for judgment against the surety company on the undertaking. This motion was granted and the judgment entered on June 23, 1930. The judgment itself recites the facts up to that date quite fully and exhibits the construction placed upon the surety company's contract by that court. (R. 18-20.)

We suggest here that petitioner's statement that this judgment was inadvertently entered, is not persuasive. It is not in accord with the record. The judgment itself not only shows the court's judicial conclusion as to the legal effect of petitioner's contract set forth in the undertaking, but also shows how that conclusion was reached.

On June 26, 1930, petitioner filed its motion to vacate such judgment, setting forth in full the grounds on which it relied at that time. (R. 22-24.) Such motion was based on the records in the action in state court, plus the affidavit of one of the surety company's counsel. That affidavit dealt largely with a pending execution sale which is not involved here, and further set forth that the surety company had not had

notice of the proceeding against it which had led to said judgment. (R. 28.) The motion raised no Federal question.

The lower court sustained the motion on the ground that the judgment was *void*. (R. 32-33.)

On the appeal of these respondents, judgment creditors there, the Idaho Supreme Court reversed the lower court. *Am. Surety Co. v. Baldwin, Idaho* (Not yet Rep.), 299 *Pac.* 341. Its opinion appears in this record in full. (R. 46-55.) After pointing out that the judgment would be void *only* in case of lack of jurisdiction in the lower court, either of the surety company or of the subject matter presented to the lower court by the motion for judgment on the undertaking, the Supreme Court said:

> "The surety company did not claim error, and appeal. It did not claim inadvertence or mistake. It challenged the court's jurisdiction and moved to set aside the judgment as void. The whole question here is a question of jurisdiction. Nothing further. Nothing else.
>
> "If a court has jurisdiction of the parties, jurisdiction of the subject matter and jurisdiction of an issue of law or fact presented, then its judgment upon that issue is not void whether erroneous or not. Such judgments in the absence of mistake or, in a proper case, motion for new trial, may be corrected only by appeal." (R. 50, f. 149.)

Its holding is summed up in the following quotation from the opinion:

> "The question or issue presented was, did the Surety Company, in its undertaking, become a party liable for every part of the judgment appealed from which might be affirmed by the Supreme Court, or did it stipulate only as to such judgment or part thereof as might be affirmed against the Singer Sewing Machine Company? To answer this question the court must look to the bond. The issue required a construction of the bond as a whole. The trial court had jurisdiction of this question. It construed the bond in favor of appellants and against the Surety Company. It was not only in that court's power, but it was its duty, to decide the question submitted. *In re* Clerf (Wn.), 104 Pac. 622; Windfrey v. Benton

(Okla.), 106 Pac. 853. Whether it decided right or wrong its decision was a judgment which could be reviewed for error, if there was error, only by this court on appeal." (R. 54, ff. 160-161.)

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## SUMMARY OF POINTS AND AUTHORITIES

### I.

#### FEDERAL QUESTION RAISED TOO LATE

Alluding briefly to petitioner's citation of authority on its Second Point, it hardly meets the situation. We submit that this application for review is not within the exception to the general rule stated in *Missouri ex rel. v. Gehner.* There this court said that the petitioner

> *"at the first opportunity,* invoked the protection of the Federal Constitution and statute. It could not earlier have assailed the section as violative of the Constitution and laws of the United States." (Italics ours.)

In short, this court held that the state statute there in question apparently did not infringe until the state court announced its *construction* thereof.

Here, petitioner had every opportunity that the law affords to raise the Federal question. It could have presented the question in its motion attacking the judgment in the lower court. (R. 22-24.) It could have appealed from the judgment and there have presented the question to the State Supreme Court.

Idaho Comp. Statutes, Secs. 7151, 7152, *Appendix.*

It did neither. The constitutional objection was never raised in any court until, apparently, it was suggested to petitioner by the dissenting opinion herein filed by one member of the Idaho Supreme Court. (R. 63, f. 188.)

We submit that this matter falls squarely within the rule of *Citizens Nat'l Bank v. Durr,* 257 *U. S.* 99, 106. This is not an instance of a decision which could not have been anticipated. The very question at issue was the jurisdiction of the lower state court. This petitioner, by asserting that the judgment was void, itself was the author of that question. Surely, a litigant should be bound to anticipate an adverse decision

as well as one favorable to him; and surely, it is his duty, where he himself takes the initiative, as here, to present in support of his own proposition those matters of law, whether constitutional or statutory, upon which he expects to rely. If so, this petition should be denied.

## II.

### NOTICE TO SURETY NOT REQUIRED

The proceeding complained of was had under an Idaho statute. That statute provides for a supersedeas undertaking to stay execution of a money judgment on the condition that if such judgment or any part thereof be affirmed the appellant will pay it as affirmed, and if not so paid within thirty days, judgment may be entered against the surety for such amount, on motion of the judgment creditor.

Idaho Comp. Statutes, Sec. 7155, *Appendix.*

In holding notice of the motion for judgment unnecessary, the Idaho Supreme Court was merely applying an Idaho statute. Also, it was giving effect to an agreement for such summary judgment, which the surety company had incorporated into the undertaking in question.

(R. 7, f. 21.)

Petitioner first contends *(Petition, page 4)*, that the proceeding for judgment on its undertaking failed of due process in that it was not notified of the motion for judgment.

Conceding that this presents a proper subject for inquiry (if it be first held that this application is entitled to be heard at all), the Idaho Supreme Court merely followed an unbroken line of authority, so far as the state courts are concerned.

While the decisions in most of the states are not of any assistance because only a few states have statutes that are the equivalent of the Idaho statute *(Sec. 7155, Appendix)*, the authorities in point will be found to support the Idaho decision, and to be based on the same statute, or its equivalent.

Gray v. Cotton, 174 Cal. 256;
Portland Trust Co. v. Havely, 36 Ore. 234;
Jewett v. Shoemaker, 124 Iowa 561;

Meredith v. S. C. M. A. of Baltimore, 60 Cal. 617;
Hawley v. Gray Bros. etc. Co., 127 Cal. 560;
Shannon v. Dodge, 18 Colo. 164.

The Ninth Circuit Court of Appeals has held likewise.

U. S. F. & G. Co. v. Fort Misery Highway District, 22 Fed. (2d) 369, 373.

The Federal District Court for Idaho recently followed the Ninth Circuit Court of Appeals, in proceedings in which this petitioner is seeking to enjoin these respondents from enforcing the judgment of which it here complains.

American Surety Company v. Baldwin, et al., 51 Fed. (2d) 596; (Adv. Sh., October 12, 1931).

This court has not, we think, decided the question of notice in any case arising under a statute like Idaho's. In one case the question was presented to this court but it was found unnecessary, because of another feature of the case, to pass upon the matter of notice to the surety. This court, however, pointed out that it was doubtful that notice to a surety is necessary, citing two of its former decisions.

Pease v. Rathbun-Jones Eng. Co., 243 U. S. 273, 279.

The cases there cited were, in principle, the same as the case at bar. They were:

United Surety Company v. Am. Fruit Prod. Co., 238 U. S. 140;

Johnson v. Chicago & P. Elev. Co., 119 U. S. 388, 400-401.

In the first, this court considered a state statute, and a supersedeas undertaking given pursuant thereto, which, like the Idaho Statute as construed by the Idaho Supreme Court, permitted judgment against the surety to be entered without notice. This court said:

> "That a man may contract to be bound by a judgment in which he has no right to be heard, and that a statute may authorize him to make himself a party to such a judgment, was decided, if it needed a decision, in *Beall v. N. Mex.*, 16 *Wall.* 535, 21 *L. Ed.* 292."

The second announced substantially the same rule.

### Petitioner's Authorities Not in Point

As we read the two cases cited on due process of law by petitioner, one of them merely holds that, where *a matter of fact* going to the jurisdiction of a state court was not actually litigated and adjudicated in the state where the judgment was rendered, the judgment debtor may plead and litigate such matter in a suit on such judgment in another state, *as an issue of fact. (Nat'l Exchange Bank v. Wiley.)* The decisions of the Ohio Court there considered are not criticized, but on the contrary.

The other *(Chicago Life Ins. Co. v. Cherry)*, as we read it, holds that where such jurisdictional fact *was* litigated in the state of original jurisdiction, it cannot be litigated again in a suit on the judgment in a foreign state. It seems to us that the portion of this latter opinion applicable here is,

> "But when the power of the court in all other respects is established," (as here) "what acts of the defendant shall be deemed a submission to its power is a matter upon which states may differ."

We submit the statement of the rule in this case as opposed to petitioner's claims.

### Petitioner Was Not Denied Its Day in Court

As a further consideration in the matter of due process, this surety company has had its day in court, witness its attack on the judgment by its motion in the lower court and the proceedings had on appeal in the Idaho Supreme Court.

Further, as pointed out in the decision of the Idaho Supreme Court (R. 50, f. 149), petitioner plainly had a right to appeal from the judgment, and thereby have it reviewed for error. That right is common in Idaho to every party litigant who feels himself aggrieved by a judgment.

Idaho Comp. Statutes, Secs. 7151, 7152, *Appendix.*

Also, as further pointed out by the Idaho Supreme Court, petitioner had a right to seek relief from the judgment on the grounds of mistake, inadvertence, surprise or excusable neglect.

Idaho Comp. Statutes, Sec. 6726, *Appendix.*

Indeed, it could simply have appealed and therein have advanced, not only its claim of *error* in the lower court's construction of the undertaking, but also the same claim made in its motion in the lower court, that the judgment was void for want of jurisdiction. By statute in Idaho, objection to the jurisdiction of the lower court is never waived, but may be raised in the Supreme Court for the first time.

Idaho Comp. Statutes, Sec. 6693, *Appendix;*
Aram v. Edwards, 9 Idaho 33.

We submit, not only that the petitioner was not denied its day in court, but that it has in fact had its day in court, with a *choice* of ample modes of procedure at its disposal. If so, it has had due process. It would seem that where the courts of a state are open to a party, *he cannot work a denial of due process by his own act* in choosing one form of procedure rather than another.

Blossom v. Railroad Co., 1 Wall. 655;
Iowa Central Railroad Co. v. Iowa, 160 U. S. 389;
Griggs v. Hanson, 86 Kans. 632.

We think it is demonstrated that this surety company, having voluntarily prepared and executed a contract of its own phrasing, and having voluntarily appeared and filed that document in the action in the state court, thereby became a party to the action and plainly consented to the terms and provisions of the Idaho statute which permitted it to become a party and to furnish such undertaking. If so, it should not now be heard to say that the proceeding thereafter had on that undertaking, conducted strictly in accordance with the statute and with the terms of the undertaking as well, deprived it of due process.

Finally, with particular reference to the closing paragraph of the petition for certiorari, we submit as demonstrated by the foregoing authorities, that the proceeding for summary judgment which occurred in this case is not "hitherto unheard of."

Also, without imposing further citations on this court, we feel it pertinent to suggest further that, under the foregoing authorities, the proceeding was distinctly not *ex parte*. The surety company was already a party to the litigation, having

become such by filing its undertaking. It was merely a well-recognized form of summary proceeding against one already voluntarily in court, pursuant to a contract entered into for a consideration.

## III.

### ALLEGED ERROR IN STATE COURT NOT REVIEWABLE IN FEDERAL COURTS

The petition herein seems to submit the further proposition, that the due process clause was infringed on in that, in petitioner's opinion, its supersedeas undertaking was susceptible of only one interpretation, to-wit: that the surety company did not agree to become liable if the original judgment should be affirmed in part only. At least, petitioner's statement of purported facts exhibits throughout a bald assumption that only one view of its agreement was possible.

There are several sufficient answers, we submit. First, the lower court must necessarily have consulted the undertaking in response to the motion for judgment thereon. Petitioner evidently contends that in so doing the court had authority to construe it *only one way*. This is manifestly incorrect. We submit as fundamental that if a court has lawful jurisdiction to adjudge a party not liable on his contract, it has equal authority to adjudge the contrary.

*And see also*:

Havens v. Stewart, 7 Idaho 298;
Boone v. District Court, 38 Idaho 691.

Second, due process goes only to the court's jurisdiction. If its construction of the petitioner's contract was legally unsound, such misconstruction did not affect the jurisdiction. Right decision is not a test of jurisdiction.

Fauntleroy v. Lum, 210 U. S. 230, 237.

> "The claim that the court, in disposing of some of the questions **** misconceived or misapplied the statutory and common law of the state, and thereby infringed the due process and equal protection clauses of the 14th amendment, requires but brief notice. The due process clause does not take up the laws of the several states and make all questions pertaining to them constitutional

> questions, nor does it enable this court to revise the decisions of the state courts upon questions of state law."
>
> Enterprise Irrig. Dist. v. Farmers Mutual Canal Co., 242 U. S. 157, 165.

In another case this court used the following language, as to the effect of a judgment of a state court of general original jurisdiction:

> "A judgment in its nature concludes the subject in which it is rendered, and pronounces the law of the case. The judgment of a court of record, whose jurisdiction is final, is as conclusive on all the world as the judgment of this court would be. It puts an end to all inquiry into the fact by deciding it."

And further said that such judgments and conclusions are final,

> "unless revised on error or by appeal. *** There can be no judicial inspection behind the judgment save by appellate power."

And finally characterized the rule in question as an indispensable fundamental of jurisprudence resting on

> "the most sacred principles of the common law. Time has consecrated them; the courts of the states have followed, and this court has never departed from them."
>
> Grignon v. Astor, 2 Howard 319, 341-343.

The construction of petitioner's undertaking did not rest upon nor involve an interpretation of any Federal law. Neither did the court's view of the effect of the related facts, that the judgment appealed from was joint and not several, that a single appeal was taken by the debtors jointly, and that the recitals in the undertaking were in part incorrect. Right or wrong, that construction and the state court's judicial view of the related facts are not, we submit, reviewable in any Federal court. A case very much in point, wherein the state court had construed, and decided the legal effect of, a will and trust deed and the surrounding facts, is *Nickel v. Cole,* 256 *U. S.* 222.

Therein, at *page* 225, this court said:

> "Where, as here, there can be no pretense that the court adopted its view in order to evade a constitutional issue, and the case has been decided on grounds that have no relation to any Federal question, this court accepts the decision, whether right or wrong."

Finally, on this matter of the true legal meaning of the undertaking:

That undertaking was merely the surety company's original, independent contract with these respondents, as judgment creditors.

(R. 51, ff. 152-153.)

The Idaho Supreme Court has held herein that such contract, taken in conjunction with the related portions of the record in the state court and viewed in the light of the local law of Idaho governing judgments, appeals and supersedeas,

> "presented a legitimate question and was not an imposition or fraud upon the court." (R. 54, f. 152.)

If this view of the Supreme Court be controlling, then it was the manifest prerogative of the lower state court to construe the contract and so decide such legitimate question; and we are here submitting that the view of the highest court of a state as to the legal meaning and effect of a contract which forms the basis of a litigation in that court, is final, and not reviewable in the Federal courts.

We submit that, assuming error for the sake of the argument, the instant case belongs to that class that are "left to the appropriate remedies for the correction of errors in judicial proceedings."

Ainsworth v. Harmoning, 118 U. S. 194.

---

## CONCLUSION

Primarily, we believe that the record discloses a liability on the part of the surety company which obligates it to pay respondents in accordance with the judgment against it.

Secondly, the contention of petitioner finally resolves itself into a claim of error rather than a denial of due process of law which, if existent, should be corrected upon appeal to

the Supreme Court of Idaho in accordance with the state statutes and not by application for a writ of certiorari to this Honorable court.

Respectfully submitted,

JAMES F. AILSHIE,
JAMES F. AILSHIE, JR.,
J. R. SMEAD,
*Counsel for Respondents.*

## APPENDIX

**Section 6693 (4178). When objections deemed waived.** If no objection be taken, either by demurrer or answer, the defendant must be deemed to have waived the same excepting only the objection to the jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action.

**Section 6726 (4229). General power to permit amendments, relieve from defaults, etc.** The court may, in furtherance of justice and on such terms as may be proper, allow a party to amend any pleading or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party or a mistake in any other respect, and may upon like terms, enlarge the time for answer or demurrer. The court may likewise, in its discretion, after notice to the adverse party, allow upon such terms as may be just an amendment to any pleading or proceeding in other particulars, and may, upon like terms, allow an answer to be made after the time limited by this Code, *and also relieve a party, or his legal representative, from a judgment, order or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect;* and whenever, for any reason satisfactory to the court or the judge thereof, the party aggrieved has failed to apply for the relief sought during the term at which such judgment, order or proceeding complained of was taken, the court, or the judge thereof in vacation, may grant the relief upon application made within a reasonable time, not exceeding six months after the adjournment of the term. Whenever any judgment, order or proceeding is taken against a party otherwise without default, through the neglect or failure of any attorney of such party to file or serve any paper within the time limited therefor, the court, or the judge thereof, in vacation, shall, upon application filed within the time above limited, set aside such judgment, order or proceeding and may, in its discretion, require the attorney guilty of such failure or neglect to pay the costs or expenses actually and necessarily occasioned to the opposite party by such failure or neglect, and may, in its discretion, also impose upon such attorney a penalty of not exceeding $100.00. When from any cause the summons in an action has not been personally

served on the defendant, the court may allow, on such terms as may be just, such defendant, or his legal representative, at any time within one year after the rendition of any judgment in such action, to answer to the merits of the original action. When, in an action to recover the possession of personal property, the person making any affidavit did not truly state the value of the property and the officer taking the property or the sureties on any bond or undertaking, is sued for taking the same, the officer or sureties may, in their answer, set up the true value of the property, and that the person in whose behalf said affidavit was made was entitled to the possession of the same when said affidavit was made or that the value in the affidavit stated was inserted by mistake, the court shall disregard the value as stated in the affidavit and give judgment according to the right of possession of said property at the time the affidavit was made. (Italics ours.)

**Section 7151 (4802). Who may appeal: Designation of parties.** Any party aggrieved may appeal in the cases prescribed in this code. The party appealing is known as the appellant, and the adverse party as the respondent.

**Section 7152. Time for taking appeals.** An appeal may be taken to the supreme court from a district court:

1. *From a final judgment in an action or special proceeding commenced in the court in which the same is rendered;* from a judgment rendered on an appeal from an inferior court; from a judgment rendered on an appeal from an order, decision or action of a board of county commissioners; within 90 days after the entry of such judgment. (Italics ours.)

2. From an order granting or refusing a new trial; from an order granting or dissolving an injunction; from an order refusing to grant or dissolve an injunction; from an order dissolving or refusing to dissolve an attachment; from an order granting or refusing to grant a change of place of trial; from any special order made after final judgment; and from an interlocutory judgment in action for partition of real property; within 60 days after the order or interlocutory judgment is made and entered on the minutes of the court, or filed with the clerk.

**Section 7155 (4810). Same: Supersedeas: Money Judgment.** If the appeal be made from a judgment or order directing the

payment of money, it does not stay the execution of the judgment or order, unless a written undertaking be executed on the part of the appellant, by two or more sureties, to the effect that they are bound in double the amount named in the judgment or order, that if the judgment or order appealed from, or any part thereof, be affirmed or the appeal be dismissed, the appellant will pay the amount directed to be paid by the judgment or order, or the part of such amount as to which the judgment or order is affirmed, if affirmed only in part and all damages and costs which may be awarded against the appellant upon the appeal, and that if the appellant does not make such payment within 30 days after the filing of the remittitur from the supreme court in the court from which the appeal is taken, judgment may be entered, on motion of the respondent in his favor, against the sureties, for such amount, together with the interest that may be due thereon, and the damages and costs which may be awarded against the appellant upon the appeal. If the judgment or order appealed from be for a greater amount than $2000, and the sureties do not state in their affidavits of justification accompanying the undertaking, that they are each worth the sum specified in the undertaking, the stipulation may be that the judgment to be entered against the sureties shall be for such amounts only as, in their affidavits, they may state they are severally worth, and the judgment may be entered against the sureties by the court from which the appeal is taken pursuant to the stipulations herein designated. When the judgment or order appealed from is made payable in a specified kind of money or currency, the judgment entered against the sureties upon the undertaking must be made payable in the same kind of money or currency.

FILE COPY

NOV 30 1
CHARLES ELMORE

# SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1931

No. [redacted] 3

AMERICAN SURETY COMPANY OF NEW YORK,
*Petitioner,*

*vs.*

VIVIAN F. BALDWIN and E. R. BALDWIN,
*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO

## RESPONDENTS' MOTION TO DISMISS PETITION FOR WRIT OF CERTIORARI

JAMES F. AILSHIE,
JAMES F. AILSHIE, JR.,
J. R. SMEAD,
*Counsel for Respondents.*

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# SUPREME COURT of the UNITED STATES

**OCTOBER TERM, 1931**

## No. 494

---

AMERICAN SURETY COMPANY OF NEW YORK,
*Petitioner,*

*vs.*

VIVIAN F. BALDWIN and E. R. BALDWIN,
*Respondents.*

---

**MOTION TO DISMISS PETITION FOR WRIT OF CERTIORARI**

***To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States***

Come now Vivian F. Baldwin and E. R. Baldwin, respondents in the above entitled cause, and respectfully move this Honorable Court to dismiss the petition of the American Surety Company of New York for a writ of certiorari to the Supreme Court of Idaho upon the following grounds:

I.

That the decision of the Supreme Court of Idaho reversing the order of the lower court vacating the judgment in favor of respondents herein, was not a final judgment or determination of the litigation by the Supreme Court of Idaho for the following reasons:

(a) That following the decision of the Supreme Court of Idaho, dated May 2, 1931, and the denial of the petition for re-hearing, the American Surety Company on the 13th day of July, 1931, filed its notice of appeal to the Supreme Court of Idaho from the judgment in question (Appendix A, p. 3), which appeal is now pending and undisposed of in the Supreme Court of the State of Idaho. (Appendix B, p. 4.)

(b) That following the decision of the Supreme Court of Idaho, dated May 2, 1931, and the denial of the petition for re-hearing on June 3, 1931, the American Surety Company filed a motion in the lower court to "correct said judgment **** and to vacate said judgment as corrected" which was denied by the trial court on July 13, 1931, and on the 15th day of July, 1931, the surety company filed notice of appeal to the Supreme Court of the State of Idaho from said order (Appendix C, p. 5), and which said appeal is now pending and undisposed of in the Supreme Court of the State of Idaho. (Appendix D, p. 7.)

II.

That no Federal question is involved or properly raised in this Honorable Court as is disclosed by the following portions of the record:

(a) The original motion of the surety company (R. 22-24) discloses that no Federal question or claim of denial of due process of law was raised in the trial court.

(b) The opinion of the Supreme Court of Idaho (R. 46-54) discloses that no Federal question was presented to the Supreme Court of Idaho.

(c) No attempt was made to raise any Federal question in any manner until after the decision of the Supreme Court of Idaho, May 2, 1931, when it was raised for the first time by petition for re-hearing. (R. 68.)

Respectfully submitted,

JAMES F. AILSHIE,
JAMES F. AILSHIE, JR.,
J. R. SMEAD,
*Counsel for Respondents.*

I, JAMES F. AILSHIE, counsel for respondents in the above entitled cause, do solemnly swear that the facts recited in the foregoing motion to dismiss are true, to the best of my knowledge and belief. JAMES F. AILSHIE.

Subscribed and sworn to before me this 17th day of November, 1931. MILES F. EGBERS,

[SEAL] *Notary Public for Idaho.*

## APPENDIX A

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNY OF ADA

---

VIVIAN F. BALDWIN and E. R. BALDWIN, *Plaintiffs,*

vs.

ED. ANDERSON, *Defendant,*

and

AMERICAN SURETY COMPANY OF NEW YORK, a Corporation, Surety, *Defendant.*

Filed July 13, 1931.
Stephen Utter, Clerk.
By B. Clyde Eagleson, Deputy

No. 11,860

NOTICE OF APPEAL

---

TO THE ABOVE NAMED PLAINTIFFS, VIVIAN F. BALDWIN AND E. R. BALDWIN, AND TO JAMES F. AILSHIE, JR., AND J. R. SMEAD, THEIR ATTORNEYS OF RECORD, AND TO ED. ANDERSON, DEFENDANT, AND TO H. B. WALKER, HIS ATTORNEY OF RECORD, AND TO THE CLERK OF THE ABOVE ENTITLED COURT:

YOU and each of you will please take notice that American Surety Company of New York, a corporation, surety, one of the above named defendants, hereby appeals to the Supreme Court of the State of Idaho from that certain judgment for $22,357.21, filed and entered against the said defendant in the District Court of the Third Judicial District of the State of Idaho, in and for Ada County, on June 23, 1930, and from the whole of said judgment against said defendant American Surety Company of New York.

Dated this 13th day of July, 1931.

RICHARDS & HAGA,
MARTIN & MARTIN,
*Attorneys for Defendant American Surety Company of New York.*
Residence: Boise, Idaho.

Service of the above and foregoing Notice of Appeal is hereby admitted this 13th day of July, 1931, at 2:10 p. m.

JAMES F. AILSHIE, JR.,
J. R. SMEAD,
*Attorneys for Plaintiffs.*

Service of the above and foregoing Notice of Appeal is hereby admitted this 13th day of July, 1931.

ED. ANDERSON,
*Defendant.*

STATE OF IDAHO, } ss.
COUNTY OF ADA }

I, STEPHEN UTTER, Clerk of the District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada, do hereby certify that the foregoing is a true and correct copy of the original Notice of Appeal filed in the above entitled action and remaining now on file in my office in Boise City, Ada County, Idaho.

GIVEN under my hand and the seal of said court at Boise City, Ada County, Idaho, this 12th day of November, 1931.

STEPHEN UTTER,
*Clerk.*
By OTTO F. PETERSON,
*Deputy.*

[SEAL]

---

## APPENDIX B

IN THE SUPREME COURT OF THE STATE OF IDAHO

---

VIVIAN F. BALDWIN and E. R. BALDWIN, *Respondents,*

vs.

ED. ANDERSON, *Defendant,* and AMERICAN SURETY COMPANY OF NEW YORK, a Corporation, *Appellant.*

No. 5783
CERTIFICATE

---

I, T. BAILEY LEE, Chief Justice of the Supreme Court of the State of Idaho, do hereby certify that the above entitled cause, being an appeal from the judgment entered June 23,

1930, in case No. 11860 in the District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada, in which notice of appeal was filed July 13, 1931, is now pending and undisposed of in the Supreme Court of the State of Idaho.

November 12, 1931. T. BAILEY LEE,
*Chief Justice.*

Attest:
CLAY KOELSCH, *Clerk.* [SEAL]

---

## APPENDIX C

### IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

---

VIVIAN F. BALDWIN and E. R. BALDWIN, *Plaintiffs,*

vs.

ED. ANDERSON, *Defendant,*

and

AMERICAN SURETY COMPANY OF NEW YORK, a Corporation, Surety, *Defendant.*

Filed July 15, 1931.
Stephen Utter, Clerk.
By B. Clyde Eagleson, Deputy

No. 11,860

NOTICE OF APPEAL

---

TO THE ABOVE NAMED PLAINTIFFS, VIVIAN F. BALDWIN AND E. R. BALDWIN, AND TO JAMES F. AILSHIE, JR., AND J. R. SMEAD, THEIR ATTORNEYS OF RECORD, AND TO ED. ANDERSON, DEFENDANT, AND TO H. B. WALKER, HIS ATTORNEY OF RECORD, AND TO THE CLERK OF THE ABOVE ENTITLED COURT:

YOU and each of you will please take notice that American Surety Company of New York, a corporation, surety, one of the above named defendants, hereby appeals to the Supreme Court of the State of Idaho from that certain order of the above entitled Court made and entered on the 13th day of July, 1931, denying and overruling the motion of said defendant American Surety Company of New York to correct said

judgment to make it speak the truth in certain particulars and to vacate said judgment as corrected and from the whole of said order.

Dated this 14th day of July, 1931.

RICHARDS & HAGA,
MARTIN & MARTIN,
*Attorneys for Defendant American Surety Company of New York.*
Residence: Boise, Idaho.

Service of the above and foregoing Notice of Appeal is hereby admitted this 14th day of July, 1931.

JAMES F. AILSHIE, JR.
J. R. SMEAD,
*Attorneys for Plaintiffs.*

Service of the foregoing Notice of Appeal is hereby admitted this 14th day of July, 1931.

ED. ANDERSON,
*Defendant.*

STATE OF IDAHO, } ss.
COUNTY OF ADA }

I, STEPHEN UTTER, Clerk of the District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada, do hereby certify that the foregoing is a true and correct copy of the original Notice of Appeal filed in the above entitled action and remaining now on file in my office in Boise City, Ada County, Idaho.

GIVEN under my hand and the seal of said court at Boise City, Ada County, Idaho, this 12th day of November, 1931.

STEPHEN UTTER,
*Clerk.*
By OTTO F. PETERSON,
*Deputy.*

[SEAL]

## APPENDIX D

### IN THE SUPREME COURT OF THE STATE OF IDAHO

VIVIAN F. BALDWIN and E. R. BALDWIN, *Respondents,*

vs.

E D. A N D E R S O N, *Defendant,* and AMERICAN SURETY COMPANY OF NEW YORK, a Corporation, *Appellant.*

No. 5783
CERTIFICATE

I, T. BAILEY LEE, Chief Justice of the Supreme Court of the State of Idaho, do hereby certify that the above entitled cause, being an appeal from that certain order of the District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada, in case No. 11860, made and entered on the 13th day of July, 1931, denying and overruling the motion of defendant American Surety Company of New York to amend and correct the judgment of June 23, 1930, and to vacate said judgment as corrected and from the whole of said order, in which notice of appeal was filed July 15, 1931, is now pending and undisposed of in the Supreme Court of the State of Idaho.

November 12, 1931.

T. BAILEY LEE,
*Chief Justice.*

Attest:

CLAY KOELSCH, *Clerk.* [SEAL]

FILE COPY

NOV 30 1931

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

No. [redacted] 3

AMERICAN SURETY COMPANY OF NEW YORK,
*Petitioner,*

*vs.*

VIVIAN F. BALDWIN and E. R. BALDWIN,
*Respondents.*

BRIEF IN SUPPORT OF MOTION TO DISMISS PETITION FOR WRIT OF CERTIORARI

JAMES F. AILSHIE,
JAMES F. AILSHIE, JR.,
J. R. SMEAD,
*Counsel for Respondents.*

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# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1931**

## No. 494

---

AMERICAN SURETY COMPANY OF NEW YORK,
*Petitioner,*

*vs.*

VIVIAN F. BALDWIN and E. R. BALDWIN,
*Respondents.*

---

**BRIEF IN SUPPORT OF MOTION TO DISMISS PETITION FOR WRIT OF CERTIORARI**

---

### STATEMENT OF FACTS

The motion to dismiss petition for certiorari herein presents one point only. It has seemed necessary to present this point by motion, because it depends on facts which must be shown extraneous to the record filed herein by the petitioner. We have shown these facts by the Appendices annexed to the motion.

The petition, at *page* 3 thereof, makes it appear that the judgment of the State Supreme Court herein is final because no appeal was taken therefrom; and further states, in a footnote, that no appeal was possible because of lapse of time.

After judgment was entered in the lower state court against the American Surety Company, petitioner herein (R. 18-20), the surety company, by motion in the lower court (R. 22-24) procured the lower court's order purporting to vacate said judgment as void. (R. 32-33.) Respondents (judgment creditors in state court) appealed from that order

(R. 35-36) and thereafter the State Supreme Court reversed the lower court, holding that the judgment was not void. The opinion of the State Supreme Court appears in the record in full. (R. 46-55.) Attention is called to the fact that this appeal involved nothing but the lower court's order of vacation, and that the State Supreme Court expressly pointed out that the judgment against the petitioner could not be reviewed for error on that appeal. (R. 50, f. 149; 54, f. 161.)

Since that time the surety company has made two further attacks on the judgment against it, and both proceedings are pending in the Supreme Court of Idaho. It first filed a motion in the lower court to amend the judgment, and after amending, vacate it; and from the lower court's denial of such motion, it appealed. That appeal is still pending in the Supreme court.

*See*: Motion to Dismiss Petition, Appendix C and Appendix D, pp. 5-7 of Motion.

Petitioner has also appealed direct from the judgment to the Idaho Supreme Court, which appeal is also pending.

Motion to Dismiss, Appendix A and Appendix B, pp. 3-5.

Therefore, when the petition for certiorari was filed in this court, there was pending in the Supreme Court of Idaho petitioner's appeal from the judgment here complained of, and its motion to amend and vacate said judgment was also pending in that court on a second appeal; and both proceedings are still pending.

## ARGUMENT AND AUTHORITIES

Obviously, if the Supreme Court of Idaho shall uphold this petitioner's motion to amend and *vacate* the judgment against it, that action will put an end to this litigation. Therefore, we think it sufficiently appears that the judgment in the state court is not yet final.

Further, if the State Supreme Court shall entertain petitioner's appeal from such judgment, it will thereupon review that judgment for error. If found erroneous, it will be reversed. This further possibility, we submit, amply demonstrates that the judgment in state court is not yet final.

**Pending Motion to Vacate Judgment**

That the lower court's order denying petitioner's motion to amend and vacate the judgment is properly appealable to the State Supreme Court cannot be doubted. Any special order made after rendition of judgment in the lower court is appealable under the statutes of Idaho.

Idaho Comp. Stat., Sec. 7152, subd. 2, *Appendix.*

We call attention to the fact that the petitioner had sixty days for such appeal, as shown by *Section* 7152, *supra;* and the showing appended to our motion to dismiss herein demonstrates that such appeal was taken within that period, to-wit, that the order denying the motion was made on July 13, 1931, and the appeal from that order was taken on the next day, July 14th.

*See*: Motion, Appendix C and Appendix D, pp. 5-7.

**Appeal from Judgment Also Pending**

As to the appeal from the judgment, it is true that it was not taken within ninety days next following the date of judgment.

Idaho Comp. Stat., Sec. 7152, Subd. 1, p. 6, *post.*

However, it is still a fact that this petitioner *has* appealed from the judgment and its appeal is still pending. It seems highly probable that its theory underlying such appeal is as follows: The judgment here complained of was entered on June 23, 1930. (R. 20, f. 60.) The lower court's order declaring that judgment void was entered on August 12, 1930, that being the *fiftieth* day from the date of judgment. (R. 32, f. 94.) Since that order purported to set the judgment aside, it can be contended that thereafter the judgment was not appealable until the final decision of the Supreme Court which reversed that order. In other words, that the order in the lower court vacating the judgment tolled the statute allowing ninety days after judgment for appeal (*Sec.* 7152, *supra*), and that there remained, therefore, an unexpired period of *forty* days which did not run until the final judgment of the Supreme Court reversing the lower court's order of vacation. Such reversal became final when the petition

for re-hearing in that proceeding was denied in the Supreme Court on June 3, 1931. (R. 117.)

If the Idaho Supreme Court shall uphold this theory, then this petitioner had a period of forty days next following June 3, 1931, in which to appeal from the judgment. It did appeal on the fortieth day, July 13, 1931.

*See*: Motion to Dismiss, Appendix A, page 3.

Finally, whatever petitioner's theory may be, the Supreme Court of Idaho is fully empowered to entertain the pending appeal and review the judgment for error, if it shall so construe the law of Idaho. It is wholly a matter to be decided under the Idaho statutes, it involves no Federal question, and the decision of the Idaho Supreme Court on the point will be conclusive.

**The Judgment Is Not Yet Final**

It follows that the judgment of the state courts here complained of is not yet a final judgment. Such being the case, we think this court, by a long and unbroken line of decisions, has held that the petition for certiorari herein should be denied.

Bruce, Administrator, et al. v. Tobin, 245 U. S. 18;
Chicago & N. W. Ry. v. Durham, 265 U. S. 580.

In *Bostwick v. Brinkerhoff,* 106 *U. S.* 3, this court said:

> "the rule is well settled and of long standing, that a judgment or decree, to be final, within the meaning of that term as used in the acts of congress giving this court jurisdiction on appeals and writs of error, must terminate the litigation between the parties on the merits of the case so that if there should be an affirmance here the court below would have nothing to do but execute the judgment or the decree it had already rendered."

With particular reference to petitioner's pending appeal from the judgment, as distinguished from its other appeal in the matter of its motion to amend and vacate the judgment, even if it be assumed that it is doubtful whether or not the Idaho Supreme Court will hear such appeal, it still remains a fact that it is amply empowered to do so if it sees fit. In such a situation, the further language of this court, in

*Andrews v. Virginian Ry. Co.*, 248 *U. S.* 272, 275, is particularly pertinent:

> "It is true that, under the law of Virginia, in a case like this the power of the court of appeals to review the judgment of the trial court was gracious or discretionary, and not imperative or obligatory; *but the existence of the power, and not the considerations moving to its exercise, is the criterion by which to determine whether the judgment of the trial court was final* at the time of its apparent date, or became so only from the date of the happening of the condition—the action of the court of appeals—which gave to that judgment its only possible character of finality for the purpose of review in this court. Nor is the result thus stated a technical one, since it rests upon the broadest considerations inhering in the very nature of our constitutional system of government, and material, therefore, to the exercise by this court of its rightful authority. That this is true would seem to be demonstrated by considering that if it were not so, a judgment of a state court, susceptible of being reviewed by this court, would, notwithstanding that duty, be open at the same time to the power of a state court to review and reverse, thus, in substance, depriving each court of its power, and begetting the possibility of conflict and confusion." (Italics ours.)

---

## CONCLUSION

We submit that either of the proceedings now pending in the Supreme Court of Idaho is sufficient to require the denial of this petition. In the one, the State Supreme Court may amend the judgment and vacate it. Such is the express tenor of the proceeding. In the other, the Supreme Court may review the judgment for error, and so doing, if it finds the judgment erroneous, will undoubtedly reverse it.

In any event, the judgment is not at present final, and the petition for certiorari should be denied.

Respectfully submitted,

JAMES F. AILSHIE,
JAMES F. AILSHIE, JR.,
J. R. SMEAD,
*Counsel for Respondents.*

## APPENDIX

**Section 7152. Time for taking appeals.** An appeal may be taken to the supreme court from a district court:

1. From a final judgment in an action or special proceeding commenced in the court in which the same is rendered; from a judgment rendered on an appeal from an inferior court; from a judgment rendered on an appeal from an order, decision or action of a board of county commissioners; within 90 days after the entry of such judgment.

2. From an order granting or refusing a new trial; from an order granting or dissolving an injunction; from an order refusing to grant or dissolve an injunction; from an order dissolving or refusing to dissolve an attachment; from an order granting or refusing to grant a change of place of trial; *from any special order made after final judgment;* and from an interlocutory judgment in action for partition of real property; *within* 60 *days* after the order or interlocutory judgment is made and entered on the minutes of the court, or filed with the clerk. (Italics ours.)

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MAR 21 1932

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1931**

No. [redacted] 21

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VIVIAN F. BALDWIN and E. R. BALDWIN,
*Petitioners,*

*vs.*

AMERICAN SURETY COMPANY OF NEW YORK,
a Corporation,

---

**Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit,**
**and**
**Brief in Support Thereof**

---

JAMES F. AILSHIE, JR.,
J. R. SMEAD,
*Counsel for Petitioners.*

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# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1931**

No. .....

---

VIVIAN F. BALDWIN and E. R. BALDWIN,
*Petitioners,*

*vs.*

AMERICAN SURETY COMPANY OF NEW YORK,
a Corporation,
*Respondent.*

---

## Petition for Writ of Certiorari

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*To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

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The petition of Vivian F. Baldwin and E. R. Baldwin respectfully shows to this Honorable Court:

### OPINIONS OF THE COURTS BELOW

The decision of the United States Circuit Court of Appeals for the Ninth Circuit, which petitioners seek to have this Honorable Court review, was filed January 18, 1932, petition for rehearing being denied February 23, 1932. (R., 267) The opinion is not yet reported, but will be found commencing at page 250 of the record.

Other decisions rendered in the course of the litigation involved herein are:

American Surety Co. v. Baldwin, 51 Fed. (2d) 596. (R., 183);

Baldwin v. American Surety Co., 50 Idaho 606. (R., 47);

Baldwin v. Singer Sewing Machine Co., et al., 49 Idaho 231.

## ORDER OF THE SUPREME COURT OF THE UNITED STATES

In addition to the foregoing, we respectfully call attention to the following case pending in this Honorable Court:

American Surety Co. v. Baldwin, October Term, 1931, No. 494, United States Supreme Court,

and to the order entered therein January 11, 1932. (Not officially reported.)

## SUMMARY STATEMENT OF THE MATTER INVOLVED

Petitioners commenced an action for damages in the District Court of Ada County, State of Idaho, against the Singer Sewing Machine Company and Ed Anderson, which resulted in the entry of judgment, May 31, 1928, in favor of petitioners and against defendants Singer Sewing Machine Company and Ed Anderson, jointly, with no several liability adjudged against either of them. (R. 33) Thereafter, on August 27, 1928, the said two defendants gave a *joint* (not joint and several) notice of appeal to the Supreme Court of Idaho, which notice recited that the appeal was from the judgment "* * * and from the whole thereof." (R. 35)

Two days later, the American Surety Company (respondent herein) appeared in the action and filed its supersedeas undertaking, pursuant to Section 7155, Idaho Compiled Statutes, (Appendix A) conditioned that whereas the joint appeal was from the *whole* of the judgment, execution should be stayed as to the judgment *so appealed from* and that "* * * if the said judgment appealed from, or any part thereof, be affirmed * * *" the said judgment would be paid; and if not paid within thirty days after the filing of the remittitur of the Supreme Court of Idaho "* * * judgment may be entered on motion of the respondents in their favor and against the undersigned surety for the said sum * * *." (R. 19)

This undertaking was not the ordinary contract of principal and surety and was not signed by any one as principal (R. 21) but was, as construed by the Supreme Court of Idaho, "* * * a complete, independent contract. The obligation of its maker (the surety company) is not collateral or secondary." (R. 52) Upon appeal to the Supreme Court of Idaho, the

judgment was affirmed as to the defendant Anderson and reversed as to the Singer Sewing Machine Company, (Baldwin v. Singer Sewing Machine Company, et al., 49 Idaho 231) remittitur being filed in the trial court May 22, 1930. (R. 26)

June 23, 1930, (more than thirty days having elapsed since the filing of the remittitur and the judgment being unpaid) petitioners appeared and moved the trial court to enter judgment in their favor and against the American Surety Company, which motion was granted and judgment was entered in favor of petitioners and against the American Surety Company in the sum of $22,357.20, together with interest thereon, and a provision "* * * that the plaintiffs have execution therefor." (R. 24) Execution was immediately issued and levied by the sheriff of Ada County the following day.

Three days later, the American Surety Company, through its counsel, appearing generally, (R. 35, 36, 39) moved to vacate and set aside the judgment upon the grounds that it was void, that its enforcement was contrary to good conscience and equity, and that the judgment was entered without notice to the American Surety Company or the Singer Sewing Machine Company. (R., 36) In the same instrument the surety company moved the court to stay all proceedings under execution upon said judgment. (R., 38) The motion was made and based upon all the records and files in the action and a copy of the supersedeas undertaking attached to the motion. (R., 38-39) August 12, 1930, the trial court entered an order declaring the said judgment of June 23, 1930, void, and quashing the execution proceedings thereunder, from which petitioners appealed to the Supreme Court of Idaho. (R., 42)

Upon that appeal to the Supreme Court of Idaho, the surety company stipulated as to the papers to be included in the transcript on appeal, and stipulated to the correctness of the transcript. (R., 43-46) In the Supreme Court of Idaho, the American Surety Company, appearing generally, submitted the cause orally and upon briefs. (Baldwin vs. Anderson, 50 Idaho 606, 613.) Thereafter the Supreme Court of Idaho, Justice McNaughton delivering the opinion, rendered its judgment, reversing the trial court, declaring the supersedeas undertaking was the complete, independent contract of the surety, and not collateral or secondary, and declaring that the judgment of June 23, 1930, was not void. (R. 47)

The surety company's petition for rehearing was denied and the remittitur of the Supreme Court filed in the trial court June 3, 1931. (R. 65)

On June 17, 1931, respondents again caused to be issued a general execution against the American Surety Company (R. 94) pursuant to which United States bonds in the sum of $25,000.00 deposited by the surety company with the treasurer of the State of Idaho, as provided by law, were levied upon and sale of the same to satisfy execution was set for August 5, 1931. (R. 92) The long period elapsing between the date of the execution and date of sale was due to Section 5104, Idaho Compiled Statutes, (R. 96) which requires that securities deposited with the State Treasurer by a foreign surety company cannot be sold until 40 days notice is given to the surety at its home address.

Upon the day following the issuance of the execution, the surety company filed in the State District Court a motion *to amend and correct the judgment* of June 23, 1930, and to vacate said judgment as amended. (R. 69) In this proceeding the surety company again appeared generally (R. 69, 72) and supported its motion by a lengthy showing of fact, going into the whole proceeding which led to the entry of judgment against it. (R. 72-91)

The bill of complaint herein was not filed in the United States District Court for the District of Idaho until July 6, 1931. (R. 1) It prayed for an injunction against petitioners *and the sheriff of Ada County, Idaho,* restraining them from levying or attempting to levy upon any property of the American Surety Company or otherwise attempting to collect the judgment of June 23, 1930, (R. 16) and allegations were made that the decision of the Supreme Court of Idaho, dated May 2, 1931, was erroneous (R. 19) that the said judgment of June 23, 1930, was void for want of jurisdiction, and that according to the conclusions of the pleader, petitioners had committed fraud in merely presenting their motion for judgment. (R. 6). July 13, 1931, the motion to amend and vacate the judgment was overruled and denied by the state trial judge (R. 132-133) and on the same day a notice of appeal to the Supreme Court of Idaho from the said judgment of June 23, 1930, was served and filed by the surety company. (R. 122) Two days later the surety company served and filed its notice of appeal to the Supreme Court of Idaho from the

order denying its motion to amend and vacate the judgment. (R. 126) In all of these proceedings, the surety company appeared generally. No supersedeas or undertaking to stay execution of the judgment on appeal to the Supreme Court of Idaho was filed, although the Idaho statutes permitted the company to do so as a matter of right; Section 7155, Idaho Compiled Statutes. (Appendix A)

The surety company's motion for temporary injunction was heard July 28, 1931 (R. 192) in the United States District Court, after the surety company's appeal from the state court judgment had been taken and after its motion in state court to amend that judgment had been denied and it had taken a second appeal from that denial to the Supreme Court of Idaho. (R. 122, 126) The hearing was had upon the bill of complaint, (R. 1) petitioners' (defendants therein) showing in opposition thereto, (R. 29) and the surety company's rebuttal showing, as well as upon petitioners' motion to strike from the bill (R. 146) and motion to dismiss. (R. 144) On July 31, 1931, Federal Judge Cavanah handed down his memorandum opinion (American Surety Company v. Baldwin, 51 Fed. (2d) 596) (R. 183) and in conformity therewith, on August 1, 1931, entered an order denying the surety company's motion for a temporary injunction and sustaining and granting defendants motion to strike and granting defendants motion to dismiss the bill of complaint. (R. 192) The same day, upon the refusal of the surety company to plead further, a final decree was entered, dismissing the bill with prejudice, (R. 194) from which appeal was taken to the United States Circuit Court of Appeals for the Ninth Circuit. (R. 206)

August 14th, 1931, on application of the surety company (R. 223), and over the objections of your petitioners, (R. 232) the Circuit Court of Appeals entered a temporary restraining order pending appeal. (R. 236)

At this point we beg leave to digress from the record of this particular proceeding and refer to the case of *American Surety Company, petitioner, vs. Vivian F. Baldwin and E. R. Baldwin, No.* 494, *October Term*, 1931, now pending in this Honorable Court and referred to in the decision of the Circuit Court of Appeals. (R. 253) That proceeding is based upon a petition of the American Surety Company for writ of certiorari to review the decision of the Supreme Court of Idaho

dated May 2, 1931, the identical decision in question in the case at bar. (R. 47)* For convenience we shall refer to that proceeding instituted by the American Surety Company as Case No. 494. In that case, on October 30, 1931, the surety company filed a transcript of the record in the Idaho Supreme Court together with its petition for writ of certiorari, in this Honorable Court, in response to which these petitioners (respondents therein) filed their motion to dismiss the petition for certiorari upon the grounds (1) that the two appeals taken by the surety company to the Supreme Court of Idaho (R. 122, 126) were pending and undisposed of in the Idaho court and (2) that no Federal question was properly raised. Respondents also filed brief in opposition to petition for writ of certiorari (all in the records of Case No. 494).

While those matters in Case No. 494 were pending in this Honorable Court, the case at bar was called for argument in the United States Circuit Court of Appeals for the Ninth Circuit on December 14, 1931, at which time the court was advised that the surety company's petition for writ of certiorari to the Supreme Court of Idaho was pending in the Supreme Court of the United States in Case No. 494. (R., 253) On the 11th day of January, 1932, this Honorable Court entered its order** in Case No. 494, which cause is still pending.

We have gone into this proceeding in some detail for the reason that the question of due process passed upon by the Circuit Court of Appeals is the identical question presented to this court upon the surety company's petition for writ of certiorari to the Supreme Court of Idaho.

January 18, 1932, the Circuit Court of Appeals filed its opinion and judgment reversing the trial court's final decree of dismissal, and directing that a temporary injunction be issued by the trial court. (R., 250, 266) The order of the trial court, sustaining the motion to strike from the complaint was not, however, disturbed.

In reversing the lower court, the Circuit Court of Appeals in effect expressly reversed the decision of the Supreme Court of Idaho of May 2, 1931, in the following language:

*The identical decision appears at pages 46 to 55 of the record filed in this court in Case No. 494, October Term, 1931.

**"IT IS ORDERED by the Court that action upon the petition for writ of certiorari in the above entitled cause be, and the same is hereby, withheld awaiting the action of the Supreme Court of Idaho in the matters pending before it."

"This view is inconsistent with the decision of the Supreme Court of Idaho, but the majority of the court there assumed upon the appeal in question that the surety was in court at the time of the hearing of the motion for judgment against it and that therefore the court not only had jurisdiction of the subject matter of the judgment but of the parties and that its decision, although erroneous, was not void." (R., 260)

The Circuit Court of Appeals further held that the Singer Sewing Machine Company was the principal in the supersedeas under consideration (R., 260), in conflict with the construction placed upon Section 7155, Idaho Compiled Statutes, by the Supreme Court of Idaho, which held that the contract of the surety was a separate, independent obligation of the surety company through which it made its voluntary appearance in the State District Court and thereby became a party to all proceedings thereafter. (R., 52) The Circuit Court of Appeals further held that the giving of judgment was "in violation of the Federal Constitution" (R. 260), and declined to give full faith and credit to the judgment of the Supreme Court of Idaho, (R. 256) or consider the decision of the Supreme Court of Idaho *res judicata.*

Petition for rehearing was filed in the Circuit Court of Appeals which was denied February 23, 1932 (R., 266), and upon application (R. 267) a stay of mandate was ordered. R. 268) Therefore this petition for writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to review said decision is presented.

## REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

(a) The decision of the Circuit Court of Appeals for the Ninth Circuit is in conflict with decisions of the Circuit Courts of Appeals for the Second, Sixth and Eighth Circuits on a controlling and decisive question of law involved in this case.

Thomas v. Virden, 160 Fed. 418, (2d C. C. A.);

Phelps v. Mutual Reserve Fund Life Assoc., 112 Fed. 453 (6th C. A. A.);

Ostrander-Seymour Co. v. Grand Rapids Trust Co., 50 Fed. (2d) 567 (6th C. C. A.);

Serpell-Weinner-Jordan v. Crete Mills, 51 Fed (2d) 1028. (8th C. C. A.);

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(b) The Circuit Court of Appeals for the Ninth Circuit has decided an important question of local law in a way in conflict with the local applicable decisions, in that the Circuit Court of Appeals has held that the Singer Sewing Machine Company was principal and the American Surety Company surety in the supersedeas undertaking filed in the State Court, (R., 19) whereas the Supreme Court of Idaho has held that the bond given, under Section 7155, Idaho Compiled Statutes, is the separate, independent contract of the surety company, and that its liability thereunder is neither collateral nor secondary.

Baldwin v. American Surety Co., 50 Idaho 606.

Such decision of the Circuit Court of Appeals is in conflict with the weight of authority and with local decisions of states other than Idaho, having statutes similar to Idaho's Section 7155, C. S., which decisions were followed and approved by the Supreme Court of Idaho.

Curtis v. Richards, et al., 9 Cal. 33, 38;*

Meredith v. S. C. M. A. of Baltimore, 60 Cal. 617;

Moffat v. Greenawalt, 90 Cal. 368;

Hawley v. Gray Bros. etc. Co., 127 Cal. 560;

Gray v. Cotton, 174 Cal. 256;**

Portland Trust Co., v. Havely, 36 Ore. 234;

Jewett v. Shoemaker, 124 Iowa 561;

Shannon v. Dodge, 18 Colo. 164;

U. S. F. & G. Co. v. Fort Misery Highway District, 22 Fed. (2d) 369. (9th C. C. A., construing Sec. 7155, I. C. S.);

*And See*: Pease vs. Rathbun-Jones Eng. Co., 243 U. S. 273.

(c) The Circuit Court of Appeals for the Ninth Circuit has declined to accept the construction placed upon Section 7155,

---

*This decision was written by Mr. Justice Field during his term as an associate justice of the Supreme Court of California.

**The several California decisions are cited for the reason that Idaho adopted the statute in question from California.

Idaho Compiled Statutes, by the highest court of the State of Idaho, and has thereby declined to follow the rule of this court announced in *Supreme Lodge, Knights of Pythias v. Meyer,* 265 *U. S.* 30.

(d) The Circuit Court of Appeals has decided an important question of general law in conflict with the weight of authority and, in doing so, has decided an important question of Federal law in conflict with the applicable decisions of this court. Namely, that a lower Federal court cannot review the decision of a State court of last resort for error, and reverse the same.

> Nickel v. Cole, 256 U. S. 222;
>
> Enterprise Irr. Co. v. Farmers, etc. Canal Co., 243 U. S. 157;
>
> Fauntleroy v. Lum, 210 U. S. 230;
>
> Arrowsmith v. Harmoning, 118 U. S. 194.
>
> Grignon v. Astor, 2 How. 319;

(e) The Circuit Court of Appeals further refused to follow and, in effect, reversed the Idaho Supreme Court, in this, that whereas the State court held that, under Section 7155, Idaho Compiled Statutes, when the surety company first appeared in the original action and filed its undertaking it thereby became and remained a party to the action, and was thereafter in court; (R., 51-52) the Circuit Court of Appeals held (R. 260) that such appearance did not make the surety company a party to the action in State court, and further stated that the Circuit Court of Appeals

> "would concur in this opinion" (of the State court) "if the premise were granted that the surety was in court at the time the trial court entered the judgment against it." (R., 260)

---

(f) The Circuit Court of Appeals for the Ninth Circuit has decided a Federal question, namely, that the judgment of the Idaho court of June 23, 1930, and the decision of the Supreme Court of Idaho, dated May 2, 1931, were "in violation of the Federal Constitution" (R., 260), and has refused to give full faith and credit to the State court judgment, in violation of Section 1, Article IV of the Constitution of the

United States, in conflict with the decision of this court in *Baldwin v. Iowa State Traveling Men's Assoc.*, 283 *U. S.* 522, *which decision we believe to be controlling in the case at bar.*

(g) The Circuit Court of Appeals has reversed the Supreme Court of Idaho and in so doing has declined to follow the rule of this court that

"Lower Federal courts are not superior to State courts."

Lion Bonding & S. Co. v. Karatz, 262 U. S. 77.

(h) By decision of the Circuit Court of Appeals, the American Surety Company has been allowed to litigate twice the question of jurisdiction, contrary to the most recent expression of this court upon the subject; *Baldwin v. Iowa State Traveling Men's Assoc.*, 283 *U. S.* 522.

The Circuit Court of Appeals has declined to follow the rules announced by the Supreme Court of Idaho in

Elliott & Healy v. Wirth, 34 Idaho 805,

*and*

Baldwin v. American Surety Co., 50 Idaho 606,

under which decisions not only the surety company's original appearance, but its motion to vacate the judgment and quash the execution, and its later proceedings in the State court, all of which later proceedings were based upon non-jurisdictional as well as jurisdictional grounds, constituted a general appearance and a waiver of lack of due process, if any such lack theretofore existed.

*See*: Western L. Indemnity Co. v. Rupp, 235 U. S. 261.

## PRAYER

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding that court to certify and send to this court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case entitled on its docket, No. 6566, American Surety Company of New York, appellant, v. Vivian F. Baldwin and E. R. Baldwin, appellees, and that the decree of the Circuit Court of Appeals for the Ninth Circuit may be reversed by this Honor-

able Court and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

VIVIAN F. BALDWIN and E. R. BALDWIN,

By JAMES F. AILSHIE, JR.,
J. R. SMEAD,
*Counsel for Petitioners.*

---

Brief in support of Petition appears on page 12.

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1931**

No.....

VIVIAN F. BALDWIN and E. R. BALDWIN,
*Petitioners,*

vs.

AMERICAN SURETY COMPANY OF NEW YORK,
a Corporation,
*Respondent.*

## Brief in Support of Petition

### I.

### OPINIONS OF THE COURTS BELOW

The opinions of the courts below are cited on page 1 of the petition herein.

### II.

### JURISDICTION

1.

The decision and judgment petitioners seek to have this court review, were entered January 18, 1932. (R., 264) Petition for rehearing was filed, and thereafter denied on February 23, 1932. (R., 267) On application of petitioners, an order of Circuit Judge Wilbur was entered staying the issuance of mandate to and including the 1st day of April, 1932, to permit the filing of a petition for writ of certiorari. (R., 268)

2.

The statutory provision believed by petitioners to sustain the jurisdiction of this court is:

Sec. 240 of the Judicial Code, as amended by the Act of February 13, 1925; 43 Stats. 938.

3.

The reasons relied upon by petitioners for the allowance of the writ appear upon pages 7 to 10 of the petition herein, and will not be repeated in the brief except as necessary to present the argument.

## III.

## STATEMENT OF THE CASE

A full statement of the case has been given under the heading SUMMARY STATEMENT OF THE MATTER INVOLVED, appearing on pages 2 to 7 of the petition, and in the interest of brevity will not be repeated in this brief. However, we desire to call attention to the fact that, while the character and amount of the judgment which petitioners seek to collect render the instant case of importance to the litigants, we believe the issues involved to be of public and general importance in at least two particulars.

First, by its decision the United States Circuit Court of Appeals for the Ninth Circuit has announced the rule that a Federal Circuit Court may, in an injunction proceeding, review an issue litigated by the identical parties, involving a state statute and contract executed thereunder, and passed upon by the highest court of the state; and in so doing expressly decline to follow or approve the opinion of the state court, and approve and adopt the opinion of a dissenting justice.*

Second, the record discloses a multiplicity of proceedings *instituted by the American Surety Company* and discloses that at one and the same time the surety company had pending four separate and distinct proceedings in three separate courts, namely:

(a) An appeal to the Supreme Court of Idaho from the judgment of June 23, 1930. (R., 122)

(b) An appeal pending in the Supreme Court of Idaho from an order denying the surety company's motion to amend and vacate the judgment of June 23, 1930. (R., 126)

(c) An appeal to the United States Circuit Court of

*It has never been contended by the surety company that Sec. 7155, Idaho Compiled Statutes, is unconstitutional, or that generally the granting of judgment upon motion without notice is unconstitutional, and no court during any of the proceedings involved herein has ever so held.

Appeals for the Ninth Circuit from a decree of the Federal District Court for Idaho dismissing its bill of complaint and denying its application for temporary injunction to restrain the judgment creditors from collecting the state judgment. (R., 209)

(d) A petition to the Supreme Court of the United States for writ of certiorari to review the decision of the Supreme Court of Idaho of May 2, 1931. (October Term, 1931, No. 494.)

The record further discloses that in each jurisdiction the surety company appeared generally and was seeking in each court to litigate the same issues.*

Wholly aside from the importance of the case to the petitioners, we believe it to be of public and general importance for this Honorable Court to take jurisdiction and review the surety company's procedure, as well as the substantive law, for so far as our search of authorities has availed us, we have been unable to find any case parallel in multiplicity of proceedings.

## IV.

## SPECIFICATIONS OF ERROR

Petitioners rely upon and adopt as their specifications of error the Reasons Relied on for The Allowance of The Writ appearing at pages 7 to 10 of the petition, which are adopted by reference and which, for convenience and brevity, are generally grouped as follows:

1.

The court erred in declining to give full faith and credit to the state judgment in question.

2.

The court erred in declining to accept the Idaho judgment as *res judicata* upon the issue of jurisdiction.

3.

The court erred in refusing to adopt the construction placed upon the Idaho statutes in question, and particularly

*Although it does not appear in the record, the Supreme Court of Idaho on February 20, 1932, dismissed the surety company's appeal from the judgment.

Section 7155, Idaho Compiled Statutes, by the Supreme Court of Idaho and in construing Idaho statutes in conflict with the decisions of the Idaho courts.

4.

The court erred in reviewing the decision of the Supreme Court of Idaho for error, and reversing the same.

5.

The court erred in failing to accept the rule of general appearance as announced by the Supreme Court of Idaho.

6.

The court erred in holding that the entry of the Idaho judgment was in "violation of the Federal Constitution."

7.

The court erred in granting a temporary injunction pending appeal, and in directing the lower court to grant a temporary injunction as prayed.

## V.

## ARGUMENT

The supersedeas bond filed by the American Surety Company was given pursuant to the strictly joint appeal of the Singer Sewing Machine Company and Ed Anderson from a joint judgment, and was an Idaho contract executed and filed in an Idaho court, pursuant to an Idaho statute, Section 7155. (App. A). The effect of the decision of the Supreme Court of Idaho in the primary or original case, (being the appeal in which the undertaking was given) was a matter for judicial determination by the Idaho courts. Petitioners accordingly moved the District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada, for judgment, that being the court in which the bond was filed and being a court of original jurisdiction under the Constitution of Idaho, Article V, Section 20.*

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*Idaho Constitution, Article V, Section 20: "Jurisdiction of district court. The district court shall have original jurisdiction in all cases, both at law and in equity, and such appellate jurisdiction as may be conferred by law."

Under the Constitution of Idaho, the Idaho statute (Section 7155) and the express terms of the bond, the court in which the motion for judgment was actually made *was the only court having jurisdiction to pass upon the surety company's liability under the bond;* and the procedure followed by petitioners was the procedure provided by statute and long established by custom.

These facts, we believe, bring the case within the rule announced by this court in Ramsey-Gatlin Const. Co. v. Vincennes Bridge Co., 283 U. S. 796, where it was said:

> "*Per Curiam*: As it appears from statements at the bar that the contract herein and the bond given pursuant thereto were made and the obligations thereof were to be performed within the State of Kentucky, and as the bond should be construed in accordance with the law of that state, and it appearing that, since the certification herein, the Court of Appeals of Kentucky has construed the bond in question and decided that one in the position of the appellee in the court below, as a subcontractor, was entitled to avail itself of the provision in the bond and maintain its action *(Aetna Casualty & Surety Co. v. Wheeler & Putnam Co.,* decided March 27, 1931, 236 Ky. .....) the Court is of opinion that there is no occasion for an answer by the Court to the question propounded in the certificate."

Following the entry of judgment, the surety company, by general appearance, moved the court to vacate and set aside the judgment upon jurisdictional grounds and upon grounds *which were not jurisdictional;* in the same motion it moved the court to quash the execution proceedings then under way, which could, of course, be done only by a court having jurisdiction. As pointed out in the decision of the Supreme Court of Idaho (R., 51) the surety company did not appeal, although under a statute of Idaho, jurisdictional grounds may be assigned for the first time upon a direct appeal.

Idaho Comp. Stat., Sec. 6693 (App. B);
Hauter v. Coeur d'Alene Min. Co., 39 Idaho 621, 634.

In the proceeding to vacate the judgment and quash the execution proceedings, the surety company litigated not only the issue of jurisdiction, but other issues presented by its

motion as to the construction of the bond. The litigation in that proceeding was based and predicated upon the objections to the judgment assigned and determined upon by the surety company in its said motion to vacate, which it *elected to rely upon* in avoiding payment of the judgment.

Furthermore, the surety company itself presented a true copy of the supersedeas as a part of its motion to vacate, filed in the state trial court (R., 36) and presented to the court the interpretation which it contended should be placed upon the bond. It being an Idaho contract, that question was one to be determined by the state court and when so determined was *res judicata*. In the decision of the Supreme Court of Idaho, as the same appears at page 52 of the Record, after citing authorities, the Court said:

> "It is claimed by respondent that these authorities are not in point because the legal effect of an undertaking is the same as that of a bond in that the party executing the undertaking is simply surety for a principal; that in this case the introductory recitals of the undertaking disclose that the principal is the Singer Sewing Machine Company, and that upon the action being dismissed as to it such dismissal was also a dismissal as to the Surety Company. *We cannot accept this view.*" (Italics ours.)

Upon this issue, we desire to call attention to a memorandum opinion of the late Judge Dietrich of the United States Circuit Court of Appeals for the Ninth Circuit, who presided as the trial judge in *U. S. F. & G. Co. v. Fort Miscry Highway District*, and whose decision was affirmed by the Circuit Court in 22 Fed. (2d) 369. This opinion is not contained in the Federal Reporter, but appears at pages 147 to 166, inclusive, in the transcript on file in the Circuit Court of Appeals for the Ninth Circuit, being Case No. 5158, and is referred to and cited with approval by Judge Cavanah in his memorandum opinion. (R., 189) The question under consideration, as hereinbefore stated, involved Section 7155, Idaho Compiled Statutes.

The language of that opinion is so apt, and we believe correct when applied to the case at bar, that we adopt it as a statement of the position of petitioners herein.

> "In rendering both the primary judgment and the subsequent judgment upon the bond, it is, therefore, thought

the Court was acting in the exercise of its general jurisdiction. By filing the bond purporting to be given under Sec. 7155, the Fidelity Company submitted itself to that jurisdiction. *And that is true whether the bond does or does not constitute a valid obligation.* Plaintiff thus in effect said to the Court that it entered its appearance for an adjudication of its rights and obligations under the bond. Any other view leads to an absurdity. It would operate to limit a court of general jurisdiction to the performance of a ministerial or a clerical, rather than a judicial function. It is a necessary attribute of such a court that it have the power to decide wrong, as well as right, and to determine questions of its own jurisdiction. If the state court has jurisdiction only in the case of a valid bond, and it is without the power preliminarily to determine this jurisdictional question, manifestly it is incapable of rendering a judgment in any case of a bond, which cannot be assailed for want of jurisdiction. *Its judgment could never be final.* * * * * *And the same result would follow,* * * * * * *in case of a general appearance by the Company* to resist judgment, *for it contends that an invalid bond fails to confer jurisdiction* of the subject matter, as well as of the person. Undoubtedly, it was the duty of the Court not to render judgment upon this bond, if it was without consideration; but some tribunal must have the power to determine whether there was or was not consideration. As is said in Fauntleroy v. Lum, 210 U. S. 230, 235: 'Under the common law it is the duty of a court of general jurisdiction not to enter a judgment upon a parol promise made without consideration; but it has power to do it, and, if it does, the judgment is unimpeachable, unless reversed.' See, also, to the same effect Burnet v. Desmornes, 226 U. S. 145. The power conclusively to decide whether such a bond is valid must be lodged in some competent tribunal, and clearly I think that power is possessed by the court in which it is filed. A surety thus enters appearance and submits to its jurisdiction both the person and the subject matter. In any other view the judgment so provided for, whether it be in favor of or against the surety, would be a futile thing, for in any case the defeated party could bring a plenary suit either in the same, or some

other court, and by pleading the invalidity of the bond, compel an adjudication of that question *de novo.*" (Emphasis ours.)

If the reasoning found in this decision of Judge Dietrich is sound, the hypothetical question to which he referred is actually realized in the case at bar.

## BALDWIN v. IOWA TRAVELING MEN'S ASS'N, 283 U. S. 522, IS BELIEVED TO BE CONTROLLING

In the case above cited, Mr. Justice Roberts, in discussing the question of jurisdiction, said:

> "Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause."

This opinion, so far as we have been able to ascertain, is the latest expression of this Honorable Court upon the question and is, we believe, controlling in the case at bar.

For, in addition to the reasons stated by Mr. Justice Roberts in the Iowa case, the case at bar involves a state judgment which, under Sec. 1, Art. IV of the Constitution of the United States and the decisions of this court, is entitled to full faith and credit in the courts of the United States. Further, the Iowa case decides that due process of law does not involve the right to litigate the same question twice. In the case at bar, the American Surety Company does not ask that it merely be allowed to litigate the question of jurisdiction *twice,* but insists that it shall have *three* separate and distinct hearings, for the record discloses a motion to amend and correct the judgment filed only a few days before the injunction proceeding was filed in the Federal court, which had not been passed upon by the State trial court when the bill of complaint was filed with the Federal court. And the surety's appeal therein was not only pending on the day the opinion

of the Circuit Court of Appeals was filed but the same is actually, at the date of the writing of this brief, pending and undisposed of in the Supreme Court of Idaho. The correctness of our position was apparently recognized by the surety company, for in its bill it endeavored to plead fraud, although such allegations were so totally insufficient as to be stricken, (R., 192) and the order granting the motion to strike was not disturbed by the Circuit Court of Appeals. The bill, therefore, stripped of the conclusions of fraud, disclosed upon its face first, that the question of jurisdiction was *res judicata,* and, second, that a final judgment on the question of jurisdiction had been entered by the Supreme Court of Idaho, which judgment is entitled to full faith and credit under Sec. 1, Art. IV of the Constitution of the United States.

The opinion of Mr. Justice Roberts is also important, we believe, in distinguishing *National Exchange Bank v. Wiley,* 195 *U. S.* 257, which is cited and relied upon in the decision of the Circuit Court of Appeals. (R., 258)

Also see:

Forsyth v. Hammond, 166 U. S. 506.

## SPECIFICATIONS OF ERROR NOS. 3 AND 4

As to specifications of error 3 and 4, the opinion of the Idaho Supreme Court (R., 47-56) plainly discloses that the Court held in view the joint nature of the judgment and the joint appeal therefrom, in connection with which the surety company's undertaking was filed in the State court. The opinion states that the litigants discussed

> "the legal effect of the different provisions of the bond *in the light of the nature of the appeal.*" (R., 50)

The Idaho court held (1) that the Singer Company was not the surety company's principal in the contract in question, and (2) that the Supreme Court's reversal of the original judgment as against the Singer Company did not dismiss the surety company from the action. It so held after construing the undertaking to the point of determining that it presented "a legitimate question" for judicial determination. (R., 55) From these propositions the court concluded that the surety company was still in court, that therefore notice of petitioners' proceeding, by motion, for judgment against it was not required, and that the meaning and effect of its

contract was a matter to be determined by the trial court in the exercise of its jurisdiction theretofore obtained. (R., 52-55)

It follows that the Circuit Court of Appeals was mistaken in stating in its opinion (R., 260) that the Idaho Supreme Court merely *assumed* that the surety was in court at the time of the motion for judgment.

On the other hand, the Circuit Court of Appeals refused to accept the Idaho court's decision, and held that the Singer Company was the principal in the surety company's contract and that the reversal of the original judgment as against the Singer Company dismissed the surety company from the action. The opinion discloses that it was on these two propositions and these alone, that the Circuit Court arrived at the conclusion that due process of law had been denied the surety company.

In short, both the Federal and State courts are agreed that the surety company and its contract were in court originally; but the Federal Appellate Court has reviewed and reversed the decision of the State Supreme Court as to what, under the laws of the state, would operate to dismiss the surety company. It has placed its own construction upon the State statutes and the contract. That construction is the sole basis for the judgment which the Circuit Court of Appeals entered. In substance, the Circuit Court holds that the State trial court, in deciding the issue presented by petitioners' motion, should have consulted the undertaking and construed it; but that it was not empowered to place thereon its own construction; that the court should have taken the incorrect and misleading recitals of purported fact therein as controlling, instead of considering, as did both the trial and Supreme courts, the *conditions* therein stated upon which the surety company agreed to become liable, and the nature of the judgment and the appeal in the light of the pertinent state statutes.

## SPECIFICATIONS OF ERROR NOS. 5 AND 6

As to specifications of error Nos. 5 and 6, this court heretofore announced the following rule, in *Western L. Indemn. Co. v. Rupp*, 235 *U. S.* 261:

> "That a state, without violence to the 'due process' clause of the 14th amendment, may declare that one who voluntarily enters one of its courts *to contest any ques-*

*tion there pending* shall be deemed to have submitted himself to the jurisdiction of the court *for all purposes of the action* * * * is settled by the decision of this court in York vs. Texas, 137 U. S. 15; 34 L. Ed. 604; 11 Sup. Ct. Rep. 9; followed in Kauffman vs. Wooters, 138 U. S. 285; 34 L. Ed. 962; Sup. Ct. Rep. 298." (Italics ours.)

We submit that under this rule the Idaho Supreme Court did no violence to the 14th amendment in holding herein that pursuant to its appearance and the filing of its undertaking in the original action, the surety company and its contract remained within the jurisdiction of the court for all purposes relating to a determination of the meaning of that contract and the obligation of the surety company thereunder.

If we are correct thus far, it follows that the Circuit Court was fundamentally in error in holding that due process had been denied the surety company.

Speaking with particular reference to the assignment of error 6, the decision of this court last above quoted from is authority for the further proposition, that even though a proceeding may have been had in State court against a party, without due process of law, yet if such party thereafter comes into the State court in that proceeding, the State court has the exclusive power to determine whether or not such appearance brings the party within the jurisdiction for all purposes.

The Idaho Supreme Court, long prior to the matter here in question, announced the rule that where a party comes into a State court after judgment has been rendered against him, and seeks to vacate the judgment, he must restrict himself to the question of jurisdiction only. If he claims a lack of notice as voiding the judgment, but also seeks to have execution proceedings on the judgment quashed, he thereby submits himself to the jurisdiction of the court as to all things at issue in the action.

Elliott & Healy v. Wirth, 34 Idaho 805, 806.

This respondent did precisely the same thing that was done in the Wirth case, *supra*. It came into court after judgment, contending that the judgment was void for want of notice, and also sought and obtained an order quashing the execution proceedings then under way; and further sought equitable relief, as well as a construction of its contract which

necessarily went into the substantive merits of the matter. (R., 36-39)

After litigating that matter to the court of last resort, the surety company again appeared generally and presented its motion to *amend* the judgment, which it here contends was *void*. (R., 69-72) After a full hearing and lengthy showing of fact and a denial of that motion, it appealed to the Idaho Supreme Court, where that appeal is still pending.

Also, it took a general appeal from the judgment itself, in which, obviously, it sought a review of the judgment for error in substantive matters, since the question of jurisdiction had been litigated and determined by the State Supreme Court before this last mentioned appeal was taken.

We submit that the several general appearances of this respondent in State court and the numerous non-jurisdictional matters presented by it to the State courts, effectually bring it within the rule, that if there were originally any lack of due process, it has been waived. If so, the Federal Appellate Court erred in not so holding.

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In concluding we respectfully submit that this case presents a conflict between State and Federal courts which can only be finally determined by the decision of this Honorable Court.

## CONCLUSION

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, and that to such an end a writ of certiorari should be granted and this Court should review the decision of the Circuit Court of Appeals for the Ninth Circuit, and finally reverse it.

Respectfully submitted,

JAMES F. AILSHIE, JR.,
J. R. SMEAD,
*Counsel for Petitioners.*

## APPENDIX A

Idaho Compiled Statutes, Sec. 7155.

"**Section 7155 (4810). Same: Supersedeas: Money judgment.** If the appeal be made from a judgment or order directing the payment of money, it does not stay the execution of the judgment or order, unless a written undertaking be executed on the part of the appellant, by two or more sureties, to the effect that they are bound in double the amount named in the judgment or order, that if the judgment or order appealed from, or any part thereof, be affirmed or the appeal be dismissed, the appellant will pay the amount directed to be paid by the judgment or order, or the part of such amount as to which the judgment or order is affirmed, if affirmed only in part and all damages and costs which may be awarded against the appellant upon the appeal, and that if the appellant does not make such payment within 30 days after the filing of the remittitur from the supreme court in the court from which the appeal is taken, judgment may be entered, on motion of the respondent in his favor, against the sureties, for such amount, together with the interest that may be due thereon, and the damages and costs which may be awarded against the appellant upon the appeal. If the judgment or order appealed from be for a greater amount than $2000, and the sureties do not state in their affidavits of justification accompanying the undertaking, that they are each worth the sum specified in the undertaking, the stipulation may be that the judgment to be entered against the sureties shall be for such amounts only as, in their affidavits, they may state they are severally worth, and the judgment may be entered against the sureties by the court from which the appeal is taken pursuant to the stipulations herein designated. When the judgment or order appealed from is made payable in a specified kind of money or currency, the judgment entered against the sureties upon the undertaking must be made payable in the same kind of money or currency."

## APPENDIX B

**"Section 6693. When objections deemed waived.** If no objection be taken, either by demurrer or answer, the defendant must be deemed to have waived the same excepting only the objection to the jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action."

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No. 21

# The Supreme Court of the United States

OCTOBER TERM, 1931

VIVIAN F. BALDWIN and E. R. BALDWIN,
*Petitioners,*

vs.

AMERICAN SURETY COMPANY OF NEW YORK, a corporation,
*Respondent.*

## BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

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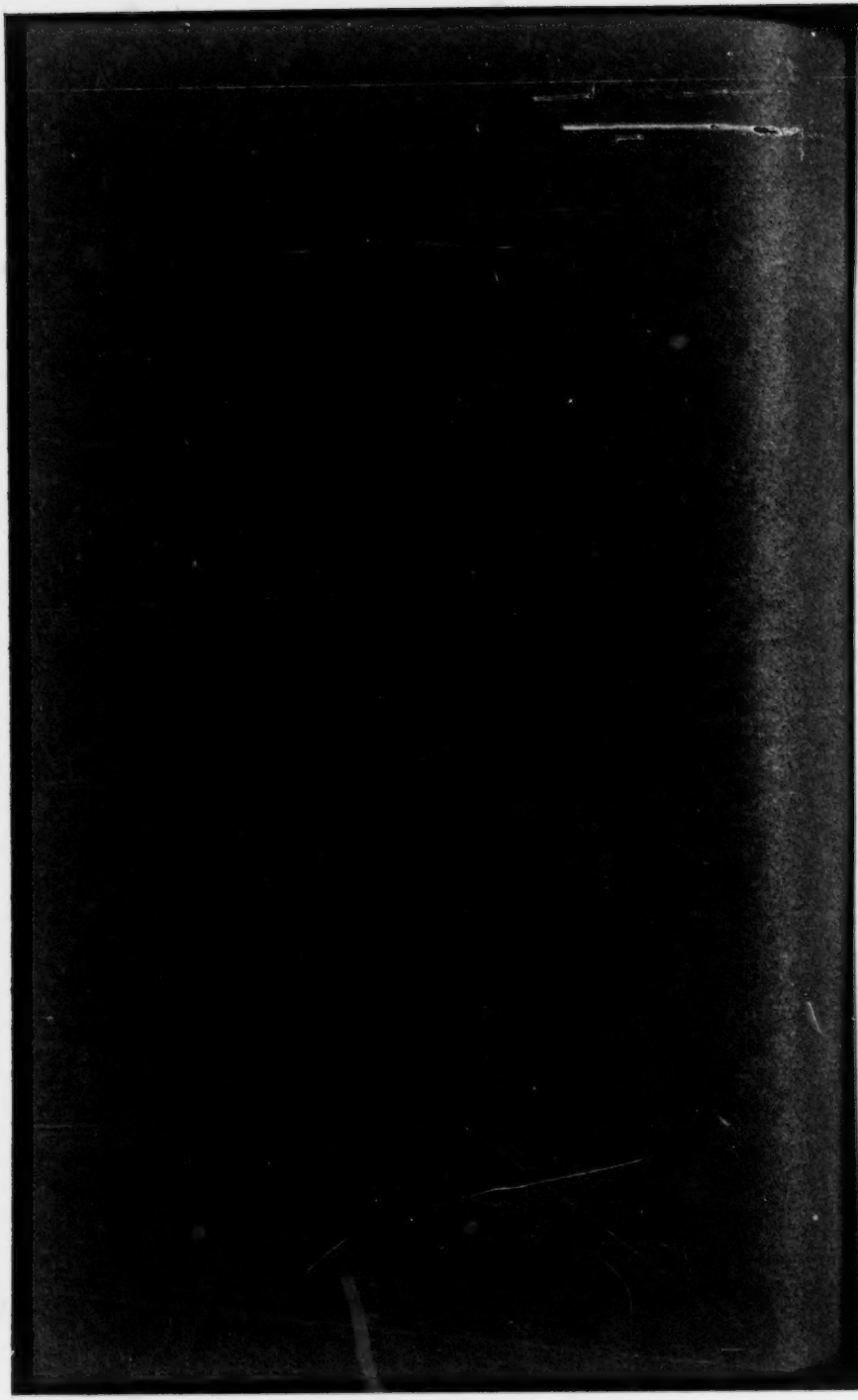

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# The Supreme Court of the United States

OCTOBER TERM, 1931

---

VIVIAN F. BALDWIN and E. R. BALDWIN,
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vs.

AMERICAN SURETY COMPANY OF NEW YORK, a corporation,
*Respondent.*

---

## BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

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### JUDGMENT NOT FINAL

Preliminary to a discussion of other questions, attention is called to the fact that the judgment of the Circuit Court of Appeals is not final. The order dismissing the bill was vacated and set aside and the case was remanded to the District Court with instructions to grant a *temporary injunction*, as prayed for. Obviously, the cause now comes before the District Court for trial on the merits. (R. 265.)

## BRIEF STATEMENT OF THE ESSENTIAL MATTERS INVOLVED

The Baldwins recovered a judgment for $19,500.00 against one Anderson (employee) and Singer Sewing Machine Company (employer) for an automobile collision. Both defendants appealed, by their respective attorneys, to the Idaho Supreme Court (R. 2-3). Anderson gave a bond for costs only, but the Company stayed the judgment against it by giving a supersedeas undertaking with the American Surety Company as surety (R. 3-4).

On appeal, the judgment was affirmed as to Anderson but reversed as to the Company, and the action dismissed as to it (R. 4-5). (Baldwin vs. Anderson, 49 Ida. 231.)

The lower State Court, pursuant to the remittitur from the Supreme Court, entered judgment in favor of the Singer Sewing Machine Company and against the Baldwins for costs on appeal and dismissed the Sewing Machine Company from the case (R. 22). About thirty days thereafter, the lower State Court, apparently inadvertently and *without notice to or process upon the American Surety Company*, entered judgment against the Surety Company on the supersedeas bond of the Singer Sewing Machine Company for the failure of Anderson to pay the judgment which had been affirmed as to him (R. 6-8, 24). As soon as the Surety Company learned of such judgment, it moved

to set it aside as void (R. 9-10, 36-39), and the judgment was duly vacated (R. 9-10, 41).

The Baldwins again appealed to the Idaho Supreme Court, which held that the lower Court, having once entered up the judgment against the Surety Company, had no power to vacate it (R. 47, dissenting opinion of Justice Budge, R. 56). The judgment of the lower Court was thereupon reinstated, and accordingly the Surety Company has a judgment against it for $22,357.21 (R. 24-26), with interest from June 23, 1930, because of the default of Anderson, who gave no supersedeas and was not embraced within the terms of the undertaking given by the Surety Company in behalf of the Singer Sewing Machine Company. The judgment against the Surety was rendered against it *without notice or process, or an opportunity to defend, and for the default of one for whom it was not surety.*

The Idaho Supreme Court expressly disclaimed any intention to consider the merits of the Surety Company's case but it confined itself wholly to the matter of procedure. It expressly refused to construe the undertaking or determine whether it obligated the surety to pay the judgment affirmed as to Anderson but reversed as to the principal in the undertaking. It simply held that the Surety Company should have appealed from the judgment thus entered against it for the default of Anderson and for whom it was not a surety, and that the lower court had no jurisdiction or authority to vacate or set aside such judgment after it had been entered.

The Idaho Supreme Court, on the appeal of the Baldwins from the order vacating the judgment against the surety, in answer to the argument of counsel for the surety that the undertaking did not cover Anderson and that it was a fraud upon the trial court for counsel to request it to enter judgment *ex parte* and without notice against the surety, expressed the essence of its decision in the following words:

> (R. 55.) "The undertaking cannot be examined and its legal effect as to that issue be determined by us on this appeal. * * * (R. 56.) We think, regardless of what our construction of the bond might be, it cannot be said appellants held no right to submit the question."

Justice Budge dissented vigorously from the opinion of the majority for refusing to consider the case on the merits. His dissenting opinion is of importance because he is the only member of the Supreme Court of Idaho that has expressed any opinion on the merits of the case or on the construction of the undertaking. Justice Budge said:

> (R. 64.) "The bond upon its face, in unmistakable language, shows that it was given to stay execution against the Singer Sewing Machine Company and for no one else, and the court therefore had no authority to construe the bond to include the judgment against Anderson. The judgment against the surety company on the supersedeas bond was therefore void when entered, and was subject to attack by motion to, and was properly set aside.

> No other result can follow from the holding of the majority than a miscarriage of justice, and it is repugnant to both the state and federal constitions in that the surety company is deprived of its property without due process of law."

The time for taking an appeal from the judgment had expired before the above decision was rendered. However, an appeal was nevertheless taken from the judgment, and that appeal was recently dismissed by the Idaho Supreme Court without again considering the merits of the case or even examining the undertaking (Baldwin vs. Anderson, et al., 8 Pac. (2d) 461). (Advance Sheet No. 2, Mar. 25, 1932.)

It is true that the Supreme Court of Idaho said:

> (R. 52.) "The undertaking is a complete independent contract",

but it did not hold that such undertaking, given under the provisions of Section 7155, C. S. Idaho, (set out in Appendix A to the petition), is not a contract of suretyship, and that such surety does not have a principal for whose default it is to become liable upon certain express conditions. The undertaking, obviously, shows that there was a principal as well as a surety, and every court and every judge that has examined the undertaking and expressed an opinion thereon has unqualifiedly held that the Surety Company was liable only for the default of the Singer Sewing Machine Company and not for the default of Anderson. That was the unqualified decision of the lower State Court that en-

tered the judgment against the surety and later vacated it and set it aside, that was the opinion of Justice Budge of the Supreme Court, and that was the unanimous opinion of the Judges of the Circuit Court of Appeals. No court or judge has ever expressed any opinion to the contrary.

## SURETY COMPANY SEEKS PROTECTION OF FEDERAL COURT

The Surety Company, being confronted with a judgment entered against it without notice or service of process, and without an opportunity to be heard on the merits of its case, asserted its claims under the Federal Constitution and sought the protection of the Federal Courts. It promptly filed its bill for an injunction against the judgment creditors and sought to enjoin them from enforcing the judgment thus wrongfully obtained against it in the State Court. The history of the litigation and the facts as to the rights of the surety are fully set out in the bill of complaint (R. 17). The facts so alleged are admitted by the motion to dismiss filed by the Baldwins. The motion to dismiss was sustained and a temporary injunction denied respondent (R. 192-194). From the decree dismissing the bill, the Surety Company appealed to the Circuit Court of Appeals, which preserved the subject-matter of the litigation during the pendency of the appeal by issuing an injunction (R. 245-248).

The decision of the Circuit Court of Appeals (55 Fed. (2d) 555 (Advance Sheet No. 2, March 28, 1932). R. 250-264) gives full faith and credit to the decision of

the Idaho Supreme Court but goes further and passes upon a matter which the State Court refused to pass upon, and upon which the Surety Company had never had its day in court, to-wit: whether, in the undertaking, the Surety Company had obligated itself as surety for Anderson as well as for the Singer Sewing Machine Company.

## WHAT THE CIRCUIT COURT OF APPEALS HELD

(1) The essence of the decision of the Circuit Court of Appeals, as stated by that Court, is:

> (R. 258.) "The surety agreed to stand good for the obligation of Singer Sewing Machine Company if that obligation was affirmed by the Supreme Court of Idaho on appeal. But that court held there was no obligation on the part of the Singer Sewing Machine Company and reversed the judgment against it. By the *ex parte* judgment entered the surety was called upon to answer for an entirely different obligation, that of Anderson."

(2) The Federal Statute (Sec. 379, Title 28, U. S. C.) applies only to enjoining parties *before final judgment* and has no application *after* judgment has been entered.

> Simon vs. Southern Ry. Co., 236 U. S. 115, 59 L. Ed. 492.
>
> Essanay Film Co. vs. Kane, 258 U. S. 358, 66 L. Ed. 658.

Wells Fargo & Co. vs. Taylor, 254 U. S. 175, 185, 65 L. Ed. 205.

Smith vs. Apple, 6 Fed. (2d) 559 (C. C. A. 8).

Fetzer vs. Johnson, 15 Fed. (2d) 145, 152 (C. C. A. 8).

National Surety Co. vs. State Bank, 120 Fed. 593 (C. C. A. 8).

Julian vs. Central Trust Co., 193 U. S. 112, 48 L. Ed. 629.

(3) The adequate remedy at law which is the test of equitable jurisdiction in the Federal courts must be an adequate remedy available in *those courts*. A remedy in the State Court is immaterial.

Franklin vs. California-Nevada Co. (C. C. A. 9), 264 Fed. 643.

C. B. & Q. Ry. vs. Osborne, 265 U. S. 14, 68 L. Ed. 878.

Risty vs. Chicago, R. I. & P. Ry. Co., 270 U. S. 378, 70 L. Ed. 642.

National Surety Co. vs. State Bank, 120 Fed. 593, 61 L. R. A. 394 (C. C. A. 8).

U. S. Life Ins. Co. vs. Cable (C. C. A. 7), 98 Fed. 761.

Coler vs. Board, 89 Fed. 257.

Borden's Condensed Milk Co. vs. Baker (C. C. A. 3), 177 Fed. 906.

3 Cyc. Fed. Procedure, page 112.

(4) A litigant need not exhaust his remedy in the State Court before seeking relief in the Federal Court. It is immaterial that he may have a right to appeal or

the right to other legal or equitable relief in the State Court.

> Borden's Condensed Milk Co. vs. Baker, 177 Fed. 906 (C. C. A. 3).
>
> National Surety Co. vs. State Bank, 120 Fed. 593 (C. C. A. 8).
>
> Chicago, R. I. & P. Ry Co. vs. Callicotte (C. C. A. 8), 267 Fed. 799, 16 A. L. R. 386. (Certiorari denied, 255 U. S. 570.)

(5) Due process of law means notice and an opportunity to defend *before* judgment is entered.

In Truax vs. Corrigan, 257 U. S. 312, 332, this Court said:

> "The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law,—a law which hears before it condemns, which proceeds not arbitrarily or capriciously, but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society."

## ARGUMENT

The following cases from other Courts of Appeals are substantially identical, both as to the facts and the law, with the case at bar, and many of them have been repeatedly cited and approved by this Court:

> National Surety Co. vs. State Bank, 120 Fed. 563 (C. C. A. 8).

Exchange National Bank vs. Joseph Reid Gas Engine Co., 287 Fed. 870 (C. C. A. 5).

Smith vs. Apple, 6 Fed. (2d) 559 (C. C. A. 8).

Chicago, R. I. & P. Ry. Co. vs. Callicotte, 267 Fed. 799 (C. C. A. 8).

Borden's Condensed Milk Co. vs. Baker, 177 Fed. 906 (C. C. A. 3).

The following cases in this Court sustain the decision of the Circuit Court of Appeals in the case at bar:

Wells Fargo & Co. vs. Taylor, 254 U. S. 175.

Marshall vs. Holmes, 141 U. S. 589.

Ex Parte Simon, 208 U. S. 144.

Simon vs. Southern Ry. Co., 236 U. S. 115.

Public Service Co. vs. Corboy, 250 U. S. 153.

Risty vs. Chicago, R. I. & P. Ry. Co., 270 U. S. 378.

Essanay Film Co. vs. Kane, 258 U. S. 358.

## THE CASE OF BALDWIN VS. IOWA TRAVELING MEN'S ASSN., 283 U. S. 522, MUCH RELIED UPON BY PETITIONERS, HAS NO APPLICATION.

There the litigant had appeared specially in the Federal Court for Missouri and contested the jurisdiction of that Court. From a decision against him, he took no appeal. Later, the judgment was sought to be enforced against him in the State of Iowa, and the defendant again raised the question of lack of jurisdiction in the Missouri court to enter the original judgment. This court simply held that that question had been de-

termined by the Federal Court for Missouri and from that decision no appeal had been taken, and the litigant could not again raise the question or seek an other adjudication thereof. Obviously, the case has nothing in common with the case at bar.

Petitioners call attention to the fact that there is now pending in this Court, pursuant to an order entered on January 11, 1932, the case of American Surety Co. vs. Baldwin, October Term, 1931, No. 494, on petition for certiorari to review the judgment of the Idaho Supreme Court in Baldwin vs. Anderson, 50 Ida. 606 (R. 47), wherein the Idaho Supreme Court held that the proper procedure of the Surety Company was by appeal from and not by motion to vacate the judgment entered against it by the lower State Court without notice or process.

Obviously, the judgment in the State Court will be effectually disposed of if the Federal Courts, upon final hearing and trial on the merits of the case at bar, enjoin the Baldwins from enforcing the judgment in the State Court. But if such injunction, for any reason, cannot issue, then the Surety Company can only be protected against a most unconscionable judgment by a review on certiorari of the above mentioned decision of the Idaho Supreme Court.

Case No. 494 is pending before this Honorable Court under an order deferring consideration of the petition pending the determination of two objections raised by the Baldwins, viz., the pendency of the appeal before

the Idaho Supreme Court from the original judgment (this appeal has since been dismissed by the Idaho Supreme Court—Baldwin vs. Anderson, 8 Pac. (2d) 461), and the appeal from the order of the lower State Court refusing to correct and revise the judgment entered against the Surety Company, which appeal is still pending.

**We respectfully submit that if this Honorable Court entertains the present petition on behalf of the Baldwins, the petition for certiorari on behalf of the American Surety Company of New York (Case No. 494) should be considered and heard at the same time.**

## THE PETITION SHOULD BE DENIED

The petition of the Baldwins for certiorari should be denied because:

(a) The judgment of the Circuit Court of Appeals is *not final* but the cause is remanded to the trial court for hearing on the merits;

(b) The decision of the Circuit Court of Appeals is NOT in conflict with the decision of any other Circuit Court of Appeals but is in harmony with many decisions of other Circuit Courts of Appeals and with the decisions of this Court;

(c) The Circuit Court of Appeals has not decided any question of local law in conflict with applicable local decisions—it has merely construed an undertaking

which the State Supreme Court held that it could not construe except on an appeal from the judgment against the surety;

(d) The Circuit Court of Appeals has not decided any question of general law contrary to any authority on the subject but in harmony with all Federal decisions, including the decisions of this Court;

(e) There has been no departure from the accepted and usual course of judicial proceedings which calls for an exercise of this Court's power of supervision.

Respectfully submitted,

OLIVER O. HAGA,
FRANK MARTIN,
*Counsel for Respondent.*

FILE COPY

Nos. 3 and 21.

OCT 7

IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1932.

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No. 3.

AMERICAN SURETY CO.,

*Petitioner,*

*vs.*

VIVIAN F. BALDWIN, *et al.*,

On Writ of Certiorari to the Supreme Court of Idaho.

---

No. 21.

VIVIAN F. BALDWIN, *et al.*,

*Petitioners,*

*vs.*

AMERICAN SURETY CO.,

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

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## BRIEF FOR AMERICAN SURETY CO.

---

WILLIAM MARSHALL BULLITT,
OLIVER O. HAGA,
McKEEN F. MORROW,
ALLAN C. ROWE,

*Counsel for American Surety Co.*

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**FIRST POINT (No. 3).**

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2. The *ex parte* judgment against the Surety Co. was therefore *absolutely void* for lack of summons or notice ..... 25

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*Jurisdictional authority.* Judicial Code §§ 237(b), 240(a), as amended February 13, 1925.

*Date of judgment, etc.* **No. 3:** May 2, 1931 (R. 45), rehearing denied June 3, 1931 (R. 117); time for certiorari extended by BRANDEIS, *J.*, until October 31, 1931 (R. 119); petition for certiorari filed October 30, 1931; certiorari granted April 25, 1932 (R. 119; 286 U. S. 536).

**No. 21:** August 1, 1931 (R. 192-194); in C. C. A. January 18, 1932 (R. 265), rehearing denied February 23, 1932 (R. 266); petition for certiorari filed March 21, 1932; certiorari granted April 25, 1932 (R. 271; 286 U. S. 537).

*Nature of cases, statute involved, etc.* Certiorari having been granted in both cases, any argument as to jurisdiction here, is probably unnecessary, but to comply formally with the Rules it is submitted:

**No. 3:** The Supreme Court of Idaho held (50 Idaho, 606: R. 46) that the Surety Co.'s execution of a *supersedeas* "undertaking" pursuant to Idaho Compiled Statutes, § 7155, given solely on behalf of the Singer Sewing Machine Co. to enable it to stay execution on a damage suit judgment pending appeal, nevertheless automatically made the Surety Co. such a party to the damage suit as bound it by any future action against it in such suit without notice to it; so that, although the judgment against the Singer Co. was reversed and the suit dismissed as to it, the Court could, without process or notice to the Surety Co., render a valid judgment against it for the liability of a co-defendant who had not superseded, without any opportunity to the Surety Co. to be heard as to its liability. That is in violation of the 14th Amendment (*National Exchange Bank* v. *Wiley*, 195 U. S. 257; *Chicago Life Ins. Co.* v. *Cherry*, 244 U. S. 25; *Missouri* v. *North*, 271 U. S. 40).

**No. 21:** The Circuit Court of Appeals enjoined the enforcement of the *ex parte* judgment above mentioned, upon the ground that the Surety Co. had been deprived of its property without due process of law (51 Fed. (2d) 596; C. C. A. 55 Fed. (2d) 555).

IN THE

# Supreme Court of the United States.

OCTOBER TERM 1932; NOS. 3 AND 21.

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AMERICAN SURETY CO. *Petitioner*

vs. No. 3. [50 Idaho 606]

VIVIAN F. BALDWIN *et al.*

*On writ of certiorari to the Supreme Court of Idaho.*

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VIVIAN F. BALDWIN *et al.* *Petitioners*

vs. No. 21 [51 Fed. (2d) 596; C. C. A. 55 Fed. (2d) 555]

AMERICAN SURETY CO.

*On writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.*

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## BRIEF FOR AMERICAN SURETY CO.

The question involved is whether the State of Idaho has deprived the American Surety Co. (hereafter called Surety Co.) of its property without due process of law, by rendering a $22,357.21 judgment against it, without giving it any notice, or any opportunity to be heard or to present evidence or reasons that it was not liable; and, the controversy would never have arisen except for an incident, as to which

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Reference to the Record in No. 3 will be cited as (R.); to the Record in No. 21 as (No. 21, p. ).

the following observation of Mr. Justice LURTON in *Venner* vs. *Farmers Loan & Trust Co.*, 90 Fed. 348, is in point:

> "We may say of Venner, touching the whole series of his dealings . . . 'It looks very much as if he had dug a pit, and was anxiously keeping the pathway to it in good order.' Into this pit he has fallen, and must there lie."

## STATEMENT OF THE CASE.

1. *The Baldwins' $19,500 judgment against Singer Co. and Ed. Anderson; supersedeas by Singer Co. only, with Surety Co. as surety; reversal of judgment as to Singer Co. and its final dismissal from the suit: and the Baldwins' plan for recovery against Surety Co. notwithstanding the reversal.* On May 31, 1928, an Idaho court rendered judgment in favor of the Baldwins (for $19,500 damages and $73.70 costs for an automobile collision) against the Singer Co. and one of its employees, Ed Anderson (R. 2); from "the whole" of which judgment they both appealed (R. 3, 12, 13). The Surety Co. executed two separate, and very distinct, "undertakings".*

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* One "undertaking" was a $300 cost bond on behalf of both appellants, by which the Surety Co. promised "on the part of said appellants, Singer Co., a corporation, and Ed Anderson that the said appellants will pay all damages and costs which may be awarded against them on appeal" not exceeding $300 (R. 4). That "undertaking" is not here involved, except as it is reflexly contrasted with the *supersedeas "undertaking"* next noticed below.

The other "undertaking", and out of which these cases arise, was the *supersedeas* bond for the Singer Co. alone, executed under Idaho Compiled Statutes, Sect. 7155:

> "Sect. 7155. SAME: SUPERSEDEAS: MONEY JUDGMENT: If the appeal be from a judgment or order directing the

The Surety Co.'s "undertaking" did not refer, directly or indirectly, to Anderson (R. 6, 7). It merely recited the *Singer Co.'s* appeal, *its* desire to stay execution, and then provided that "if the said judgment appealed from, or any part thereof, be affirmed, or the appeal dismissed", the *Singer Co.* would pay the judgment; and, if not paid by the *Singer Co.* within thirty days from the filing of the *remittitur* [mandate] from the appellate court, then, and then only, (R. 7),

> "judgment may be entered on motion of the respondents [Baldwins] in their favor and against the undersigned surety" for $19573.70 together with interest, damages and costs "which may be awarded against the said appellant, Singer Co. upon the appeal" (R. 6, 7).

The important thing to notice is that, by the express terms of the "undertaking," the Surety Co.'s obligation to

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payment of money, it does not stay the execution of the judgment or order, unless a written undertaking be executed on the part of the appellant, by two or more sureties, to the effect that they are bound in double the amount named in the judgment or order, that if the judgment or order appealed from, or any part thereof, be affirmed or the appeal dismissed, the appellant will pay the amount directed to be paid by the judgment or order, or the part of such amount as to which the judgment or order is affirmed, if affirmed only in part and all damages and costs which may be awarded against the appellant on the appeal and that if the appellant does not make such payment within 30 days after the filing of the remittitur from the Supreme Court in the court from which the appeal is taken, judgment may be entered, on motion of the respondent in his favor, against the sureties for such amount together with the interest that may be due thereon, and the damages and costs which may be awarded against the appellant on the appeal."

pay *only arises,* if and when the *Singer Co.* fails to pay; and there could be no failure by the Singer Co. to pay, if the judgment against it be *reversed.* On April 10, 1930, the Supreme Court of Idaho *reversed* the judgment as to the Singer Co. and *affirmed* it as to Anderson (*Baldwin* v. *Anderson,* 49 Idaho 231; R. 14); and on May 22, the *remittitur* was filed below (R. 15, 16).

On May 24, 1930, the lower Court, pursuant to the *remittitur,* entered a new judgment dismissing the suit as to the Singer Co., by which it did formally (R. 16):

> "ORDER, ADJUDGE AND DECREE that the plaintiffs Vivian F. Baldwin and E. R. Baldwin *take nothing* from defendant Singer Co.; and that the said cause of action be, and the same is hereby *dismissed* as to the defendant Singer Co., a corporation" [and gave judgment in favor of the Singer Co. against the Baldwins for costs].

This left the Baldwins with nothing but a worthless judgment for $19,500 against the insolvent Ed Anderson.

At the risk of repetition, it must be here emphasized that the condition of the Surety Co.'s "undertaking" was (R. 7):

> "that if the said judgment appealed from, or any part thereof, be affirmed . . . the appellant [Singer Co.] will pay . . . the amount directed to be paid as to which said judgment shall be affirmed, if affirmed only in part . . . and that if the said appellant [Singer Co.] does not make such payment" judgment may be taken against the surety.

That did not mean that the Singer Co. thereby agreed to pay the judgment against *Anderson,* but only the judgment against *itself.* The Surety Co.'s obligation was only to pay what its principal, Singer Co., was obliged to pay.

At this point, the Baldwins carefully devised a plan to secure an impregnable *ex parte* judgment against the Surety Co. by the following procedure: To assert (1) That the Surety Co. should be held for the judgment against *Anderson;* (2) That, under the terms of the *supersedeas* "undertaking", no notice was necessary to be given to the Surety Co. of an intention to hold it for *Anderson's* default (*U. S. F. & G. Co.* v. *Fort Misery Highway District,* 22 Fed. (2d) 369), before rendering judgment against it and then, if the lower court could be induced to render an *ex parte* judgment against the Surety Co., it would necessarily result in, (3) That the Surety Co. would, therefore, have no opportunity to be heard in defense of (1) and (2); and (4) That when the Surety Co. should subsequently first learn of the *ex parte* judgment that had been secretly rendered against it, it would be too late to effectively protect itself under an *ex parte* record made up against it.

Just here, is where the Baldwins fell into the pit so carefully prepared for the Surety Co. (p. 2, *supra*).

If they had only given notice to the Surety Co. and had then successfully persuaded the Idaho courts to construe the *supersedeas* "undertaking" as they desired, doubtless such construction (and the Surety Co.'s resultant liability thereunder) would have been final, the Surety Co. would have had its day in court, and any subsequent resort to the Federal Courts might have been futile.

But, fearful lest on a fair hearing, even the Idaho courts would not adopt such a violent construction of the *supersedeas,* the Baldwins decided not to give any notice to the Surety Co. and to take their chances on the validity of such a course. But in so doing, while they carefully avoided

Scylla [a hearing], they unconsciously fell afoul, as we contend, of Charybdis, *i. e.*, the 14th Amendment's guarantee of "due process."

2. *The successful consummation of the Baldwins' plan to secure a $22,357.21 ex parte judgment against the Surety Co. without notice.*

**Events of June 23, 1930.**

After the Baldwin suit had been finally dismissed as to the Singer Co. (May 24, 1930, R. 16; p. 4, *supra*), the Baldwins' counsel, Messrs. Ailshie and Smead, after full consideration, decided that June 23, 1930, was the earliest day possible to move for a judgment against the Surety Co. (No. 21, pp. 99, 102-3); and

> "We carefully computed the time and discussed the form of the motion, judgment, etc. and examined authorities bearing thereon . . . carefully calculated the time which must elapse before said proceeding could be taken, to wit, 30 days after the filing of the aforesaid *remittitur*, and discovered that June 21, 1930, would be the 30th day after such filing, excluding the date of such filing in the District [State] Court as aforesaid, which date of filing said *remittitur* was May 22, 1930; that said 21st day of June fell on Saturday, and that affiant [Smead] and said Ailshie therefore discovered that the first judicial day upon which such proceeding against said surety company on its undertaking could be had was Monday, June 23, 1930."

On June 23, 1930, Mr. Ailshie appeared before Judge KOELSCH (who, up to that time, had not had anything whatever to do with the *Baldwin* litigation, R. 2, 17), who was then listening to an argument on a petition for re-hear-

ing in a certain *Dufresne* case, in which J. F. Martin, counsel for the Singer Co. happened to be engaged (No. 21, pp. 90, 113, 181); Mr. Ailshie "sat down in one of the jurors' chairs and to all intents and purposes was listening to the argument made by counsel in the other [*Dufresne*] matter" (*Id.*). Mr. Ailshie himself, thus described his own mental attitude at that moment (No. 21, p. 181)

> "I rather *smiled inwardly* at the fact that J. F. Martin [Singer Co.'s lawyer] should be present at the time I was waiting my turn to make the motion for judgment against the American Surety Co."

After the *Dufresne* case had been disposed of, Mr. Ailshie (instead of speaking from the bar where everyone could hear him) stepped up to Judge Koelsch's desk and *orally* (certainly unobtrusively, if not secretly)* moved for judgment in favor of the Baldwins against the Surety Co., handing to Judge Koelsch a form of judgment to be signed against the Surety Co., together with all the court papers in the *Baldwin* Case (No. 21, pp. 99, 100, 104, 113, 115).

Judge Koelsch immediately asked Mr. Ailshie if notice had been given to the Surety Co., to which Mr. Ailshie

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* Mr. Ailshie defended his failure to call Mr. Martin's attention to what he [Ailshie] was about to do, thusly (No. 21, p. 182):

> "Martin & Martin were not attorneys for the American Surety Co. and therefore the said J. F. Martin would have had no right or authority to appear in connection with said motion, even if I had especially asked him to remain."

Mr. Ailshie overlooked the obvious fact that the Singer Co. (Mr. Martin's client) *would be liable over,* as indemnitor of its surety or by subrogation, *for any judgment against the Surety Co.;* and hence, as principal, the Singer Co. had an absolute right to be heard on so vital a matter affecting its surety and itself.

replied that *"no notice was necessary,"* and submitted some authorities to that effect (No. 21, pp. 100, 106, 114). Mr. Ailshie walked with Judge Koelsch to the latter's Chambers, where they further discussed the necessity of notice to the Surety Co., ending by Judge Koelsch taking the matter under advisement (No. 21, pp. 100, 106, 114, 115).

While waiting for Judge Koelsch to act, Mr. Ailshie sat during the afternoon in the near-by Chambers of Judge Brinck (who, 30 days before, had signed the judgment dismissing the Baldwin suit as against the Singer Co., R. 17), discussing with him the obtention from Judge Koelsch of a $22,357.21 *ex parte* judgment against the Surety Co. without giving it any notice (No. 21, pp. 100, 101, 115, 116).

They were still engaged in that discussion when Judge Koelsch walked in to speak to Judge Brinck about entering the proposed judgment without notice. Mr. Ailshie stepped into the adjoining room and waited.

Judge Koelsch gives an illuminating account of his interview in Judge Brinck's Chambers just before signing the $22,357.21 *ex parte* judgment against the Surety Co., without any notice to it (although his first query that morning on the oral presentation of the matter, had been *"Was notice given to the other side"?* No. 21, p. 114);

> "I remarked to Judge Brinck 'I am about to sign an important judgment.' Judge Brinck *smiled* . . . I then remarked, in substance and effect, that I had studied over the matter and believed *that was the only thing for me to do.* Judge Brinck responded by saying 'I would do it because undoubtedly the defendant *will take some procedure which will get its day in court.*' . . . I stated in

> the interview with General Martin and Mr. Morrow [June 4, 1931, a year after the entry] that at that time I considered that the signing of the judgment in the way it was done was a formal matter, with the idea that the defendant would take such procedure *as would give it a hearing.*" . . .

After those few words between the two Judges, Judge Koelsch stepped into the Court room where Mr. Ailshie was still waiting; signed the $22,357.21 judgment against the Surety Co. and gave it to the Clerk for entry* (No. 21, pp. 116, 117, 120; for Judge Koelsch's account of the entire transaction, see Record in No. 21, pp. 113-121; 105-107; 178-179). The judgment was at once entered (R. 18-20).

Mr. Ailshie immediately had an execution issued thereon against the Surety Co., and levied on $23,000 Liberty Bonds which the Surety Co. had on deposit with the Idaho State Treasurer. The Sheriff took possession of the bonds and advertised the sale thereof for June 31, 1930 (R. 29; No. 21, p. 182).

3. *The Surety Co.'s first knowledge of the judgment; its motion to vacate it; and Judge Koelsch's action in setting aside the judgment as void, and quashing the execution thereon.* The next morning—June 24, 1930—Mr. Ailshie

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* The Record in No. 21 contains considerable evidence concerning the exact circumstances under which Judge Koelsch heard the motion therefor, and signed the June 23, 1930 judgment; and particularly whether he did so in his Chambers or in open court (Cf. pp. 76, 77, 81, 85-91, 107, 116-120, 136). But however that may be, it is undisputed that no one—*not even the clerk* (pp. 85-91)—was present, except Judge Koelsch and Mr. Ailshie, at the presentation of the oral motion, during the discussion between them thereon, or at the signing of the judgment. (*Id.*)

(feeling secure in the obtention of the judgment with its carefully prepared supporting recitals, and with no other attendant record on which error might be predicated) notified the Surety Co. of the judgment and execution, which was its first notice thereof (No. 21, pp. 79, 182).

The Surety Co. immediately moved before Judge Koelsch to vacate the judgment and stay the execution (R. 21-24).*

On August 12, 1930, Judge Koelsch, in a careful opinion analysing the *supersedeas* and reviewing the authorities (No. 21, pp. 153-165); *sustained* the Surety Co.'s motion and entered a decree that the $22,357.21 *ex parte* judgment of June 23, 1930 (R. 32, 33),

> "be and the same hereby is, *vacated, annulled and set aside,* and the same is hereby declared to be *null and void,* and the execution issued pursuant thereto be, and the same hereby is *quashed* and recalled."

On August 19, 1930, the Baldwins appealed from Judge Koelsch's decree setting aside the June 23, 1930, *ex parte* judgment (R. 35-44).

4. *The Idaho Court reversed Judge Koelsch, thereby reinstating the ex parte $22,357.21 judgment against the Surety Co.* On May 2, 1931, the Supreme Court of Idaho reversed Judge Koelsch's decree (which had set aside the June 23d judgment as void); and, thereby, the June 23d

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* The Surety Co.'s procedure in promptly moving the trial court to vacate its judgment (and while it still had full control thereover), was apparently the proper course, both under the general rule, and under the Idaho practice—certainly no contrary rule had theretofore been established in Idaho jurisprudence (See authorities collated R. 103-112); and there seemed to be no reason for the Surety Co. to *appeal* from the *ex parte* judgment of June 23, 1930, rather than to seek to have the court which had entered it, to set it aside.

*ex parte* judgment, and the execution thereon, were automatically re-instated in full force upon the ground that no notice was necessary to the Surety Co.; that there was a "color of legal right" in the Baldwins to have judgment against the Surety Co.; and, hence when the Baldwins orally moved for the judgment, it was the lower court's judicial duty to decide that question one way or the other; that the sole question was one of *jurisdiction* only, *i. e.*, did the lower court have *jurisdiction* to construe the "undertaking" and to enter the June 23d judgment; that the lower court had such jurisdiction; having once (June 23) decided in favor of the Baldwins, its judgment was not void, and that it had no power later to set it aside as void. The Supreme Court reached this result without itself construing the "undertaking" or deciding whether the June 23d *ex parte* judgment was right or wrong (R. 46; BUDGE, *J.*, dissenting, R. 55-63). The opinion indicated that the Surety Co. should have *appealed* from the June 23d judgment, instead of applying to the lower court to set it aside (R. 50, 54); but, by the time that view was expressed (May 2, 1931), the 90 day limit on appeal had long since expired.*

BUDGE, *J.*, dissented on the ground that the result was (R. 63)

> "a miscarriage of justice, and is repugnant to both the State and Federal Constitutions in that the surety company is deprived of its property *without due process of law.*"

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* The Supreme Court of Idaho might have decided the case promptly enough to have enabled the Surety Co. still to *appeal* from the June 23d judgment. But it did not do so. It did not announce what it thought the Surety Co. should have done, until it was too late to do it!

The Surety Co. filed an elaborate petition for rehearing raising the "due process" question under both the State and Federal Constitutions, as well as discussing the Idaho law, with a full review of the authorities (R. 64-116) which was denied ten days later (R. 117).*

The result of the Idaho decision was that the Surety Co. is now held liable for a $19,500 judgment (and interest thereon) against Anderson, whom it never bonded; and it has never had an opportunity to defend against any such liability being imposed on it. Even conceding its right to have appealed from the *ex parte* judgment, it is not "due process" to let a judgment be rendered without notice even if an appeal is provided for. To constitute "due process" there must be an opportunity to be heard *before* the rendition of judgment.

A petition for *certiorari* was then granted (R. 119; 286 U. S. 536).

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* In order to exhaust every avenue of relief, the Surety Co. [although deeming it hopeless as out of time], appealed on July 13, 1931, from the June 23, 1930, judgment. The appeal was dismissed because "taken more than ninety days after the entry of said judgment" (*Baldwin* v. *Anderson,* Idaho, 8 Pac. (2d) 461, decided February 21, 1932; BUDGE, *J.*, dissenting).

At the same time, the Surety Co. also endeavored to have the lower court correct its judgment of June 23, 1930, so as to show that the proceedings leading up to it and its entry, were had in Chambers, and not in open Court, supported by considerable evidence (No. 21, pp. 67-133; pp. 6 to 9, *supra,* note); but on July 13, 1931, the lower court denied the motion (No. 21, p. 133), which was affirmed by a 3 to 2 decision on July 12, 1932. *Baldwin* v. *Anderson,* 13 Pac. (2d) 650; LEEPER and BUDGE, *JJ.*, dissenting in a long opinion).

**No. 21; American Surety Co. v. Baldwin, 51 Fed. (2) 596; C. C. A. 55 Fed. (2d) 555.**

5. *The Surety Co.'s successful effort in the Circuit Court of Appeals to enjoin the Baldwins from enforcing the June 23, 1930, ex parte judgment.* On July 6, 1931 (shortly after the Supreme Court of Idaho had reversed Judge Koelsch and reinstated the June 23d judgment), the Surety Co. filed its bill in equity in the Federal Court in Idaho, to enjoin the Baldwins from enforcing the *ex parte* judgment or selling $25,000 Liberty Bond seized thereunder (No. 21, pp. 1-17).

On hearing the respective motions for a temporary injunction (No. 21, p. 27) and to dismiss (*Id.*, p. 144), the District Court (CAVANAH, *J.*) denied the injunction and dismissed the Surety Co.'s bill, upon the ground that the Surety Co. had once had an adequate remedy *at law* if it had chosen to *appeal* from the *ex parte* judgment, and its failure to avail itself of that right did not open the Federal equity courts to it; that no fraud, accident or mistake was shown; and comity required the Federal Courts not to review what the State courts had done (No. 21, pp. 184-192).

The Circuit Court of Appeals *reversed* that decree, upon the authority of *National Exchange Bank* v. *Wiley*, 195 U. S. 257; and held (just as Judge Koelsch had held) that the *ex parte* judgment of June 23, 1930, against the Surety Co. was *void* because the State Court did not acquire jurisdiction over the Surety Co. to render a judgment against it for *Anderson's* default, by virtue of the *supersedeas*

undertaking; and this for the reason that such "undertaking" only gave the Surety Co.'s consent to submit itself to the jurisdiction of the State Court in so far as the *Singer Co.* was concerned; that the Surety Co. had neither waived notice nor been given notice so far as its liability for *Anderson* was concerned (No. 21, pp. 250-264).

On Baldwins' petition, *certiorari* was granted simultaneously with that of the Surety Co. (No. 21, p. 271; 286 U. S. 537).

## Specification of Errors [No. 3].

1. The Supreme Court of Idaho erred in holding that, under the Idaho Statutes, § 7155, a valid judgment could be rendered, *without service of process or other notice,* against the Surety Co. for the amount of a judgment against one Ed. Anderson, when the Surety Co. had never consented to be bound therefor, but had only consented to be bound for any judgment against the Singer Co.; and that Surety Co. could not attack it as void but was limited to an appeal on an *ex parte* record.

2. The "due process" of law which the 14th Amendment guarantees to the Surety Co., involves some notice or an opportunity to be heard *before* personal judgment can be rendered against it.

## SUMMARY OF POINTS DISCUSSED.

### FIRST POINT [No. 3].

Idaho has deprived the Surety Co. of its property without due process of law, because;

1. The Surety Co. did not consent in advance (by the supersedeas) that judgment might be rendered against it for the Anderson judgment, if it were affirmed.
2. The ex parte judgment against the Surety Co. was, therefore, absolutely void for lack of summons or notice.
3. The fatal effect of (1) and (2) cannot be avoided by saying the Surety Co. might have appealed to the Supreme Court of Idaho for relief from the ex parte judgment.

### SECOND POINT [No. 21].

The Circuit Court of Appeals was right in holding that the Federal Court should enjoin the enforcement of the June 23d judgment.

## FIRST POINT [No. 3].

Idaho has deprived the Surety Co. of its property without due process of law, because;

1. The Surety Co. did not consent in advance (by the supersedeas) that judgment might be rendered against it for the Anderson judgment, if it were affirmed.
2. The ex parte judgment against the Surety Co. was, therefore, absolutely void for lack of summons or notice.
3. The fatal effect of (1) and (2) cannot be avoided by saying the Surety Co. might have appealed to the Supreme Court of Idaho for relief from the ex parte judgment.

We submit:

I. *The Surety Co. did not consent in advance, that a judgment might be rendered against it for the amount of the judgment against Anderson, if the latter judgment should be affirmed.*

The vital question in this case, upon which all else hangs, is to determine exactly what the Surety Co. agreed to, by its *supersedeas* "undertaking," given under, and in the exact language of, § 7155 (p. 2, *supra*).

As the Supreme Court of Idaho expressly refused* to construe either the statute or *supersedeas*, this Court is free to construe them, as an original proposition, according to its own views (*Merchants National Bank* v. *Richmond*, 256 U. S. 635, at 638; *Carlson* v. *Washington*, 234 U. S. 103, at 106). The *supersedeas* "undertaking" reads (R. 6, 7);

In the District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada.

VIVIAN F. BALDWIN and E. R. BALDWIN,
Plaintiffs,

vs.

SINGER SEWING MACHINE COMPANY, a Corporation, and ED ANDERSON,
Defendants.

UNDERTAKING ON APPEAL.

Whereas the defendant, Singer Sewing Machine Company, a corporation, in the above-entitled action has appealed to the Supreme Court of the State of Idaho from the judgment made and entered against it in the above-entitled action and in the above-entitled court in favor of the plaintiffs in said action on the 31st day of May, 1928, for the sum of Nineteen Thousand

* R. 51, fol. 148; R. 54, fol. 162.

Five Hundred ($19,500.00) Dollars and for Seventy-three and 70-100 ($73.70) Dollars costs in said suit, making a total of Nineteen Thousand Five Hundred Seventy-three and 70-100 ($19,573.70) Dollars, and from the whole of said judgment;

AND WHEREAS, the said appellant, Singer Sewing Machine Company, a corporation, is desirous of staying the execution of said judgment so appeal from;

NOW, THEREFORE, the undersigned American Surety Company, a corporation authorized to, and doing business in the State of Idaho, in consideration of the premises and of such appeal on the part of said appellant, Singer Sewing Machine Company, a corporation, does hereby acknowledge itself firmly bound in the sum of Twenty-five Thousand ($25,000.00) Dollars, gold coin of the United States, that if the said judgment appealed from, or any part thereof, be affirmed, or the appeal dismissed, the appellant will pay in gold coin of the United States of America, the amount directed to be paid as to which said judgment shall be affirmed, if affirmed only in part, and all damages and costs which may be awarded against the appellant upon the appeal, and that if the said appellant does not make such payment within thirty days from the filing of the remittitur from the Supreme Court in the court from which the appeal is taken, judgment may be entered on motion of the respondents in their favor and against the undersigned surety for the said sum of Nineteen Thousand Five Hundred Seventy-three and 70-100 ($19,573.70) Dollars, together with the interest that may be due thereon and the damages and costs which may be awarded against the said appellant, Singer Sewing Machine Company, upon the appeal.

IN WITNESS WHEREOF, the said American Surety Company, has caused its name and seal to be attached hereto by its proper officers and agents at Boise, Idaho, this 28th day of August, 1928.

For easy reference, the two vital clauses will be designated as Clause A and Clause B respectively.

## I.

"From the instrument itself"—to use the canon of interpretation laid down by the Supreme Court of Idaho to determine the obligations of the "undertaking" (R. 51)*—one would never dream that there was a $19,573.70 judgment against *Anderson;* but only that there was such a judgment against the *Singer Co.*

The "undertaking" recites that the *Singer Co.* "has appealed . . . from the judgment made and entered against *it*" [describing the judgment by court, action, date and amount] "and from the whole of said judgment" and "is desirous of staying the execution of said judgment so appealed from." The Surety Co. then acknowledges itself bound for $25,000 upon condition,

### Clause A.

> "that if the said judgment appealed from, or any part thereof, be affirmed or the appeal dismissed, the appellant [Singer Co.] will pay . . . the amount directed to be paid as to which said judgment should be affirmed, if affirmed only in part and all damages and costs which may be awarded against the appellant upon the appeal."

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* Although the Surety Co. is called "the undersigned *surety*" (R. 7, fol. 21), and the contemporaneous endorsement of Baldwins' counsel designates it as a *"bond"* (R. 8, fol. 23), the Idaho Supreme Court sought to differentiate it from the ordinary supersedeas surety bond, saying (R. 51):

> "The undertaking is a complete independent contract. The obligation of its maker is not collateral. *Moffat* v. *Greenawalt* (Cal.), 27 Pac. 296. *Its obligations are to be determined from the instrument itself.*"

There is nothing in the "instrument itself" to indicate that there ever was any judgment against *Anderson.*

Clause A means that the Surety Co. guarantees (to the extent of $25,000) that the Singer Co. will pay all or any part of the judgment affirmed *as to it*, and all damages and costs awarded against *it*. The Surety Co. *did not* guarantee that the Singer Co. would pay a judgment from which it should be released by *reversal*,—even though, perchance, the judgment should be affirmed as to some one else [Anderson] whose very existence or appeal is not even disclosed in the bond.

No one can read into Clause A any condition that the Singer Co. would pay anything, except (*a*) the judgment so far as it should be affirmed against *it* and (*b*) all damages and costs awarded against *it*.

The "undertaking" then goes on to state affirmatively the following explicit terms, on which,—and only on which—the Surety Co. consented, in advance, to let a judgment go against itself (R. 7), towit;

**Clause B.**

> "if the said appellant [Singer Co.] does not make such payment within 30 days from the filing of the remittitur . . . judgment may be entered on motion of the respondents [Baldwins] in their favor and against the undersigned surety [Surety Co.] for the said sum of $19,573.70 together with the interest that may be due thereon and the damages and costs which may be awarded against the said appellant Singer Co., upon the appeal."

The Surety Co. thereby consented, in advance, that judgment might be taken against it for $19,570.70 with interest, and for all damages and costs awarded against the Singer Co., if the latter failed to pay exactly these same items

*which Clause A guaranteed it would pay.* And so we are automatically remitted to Clause A to ascertain *what* the Surety Co. guaranteed the Singer Co. would pay.*

Therefore, as stated above (p. 16), the vital question which this Court must determine is; What did the *supersedeas* "undertaking" obligate the Surety Co. to do? Was it bound only for the Singer Co.'s judgment? Or was it also bound to pay the judgment against *Anderson,* even after the Singer Co. judgment should be *reversed?*

When those questions are once answered, the correct result follows easily.

## II.

After *eleven* different judges—[Koelsch, McNaughton, Lee, Givens, Varian, Budge, Leeper, Cavanah, Wilbur, Sawtelle and James, *JJ.*] in *four* courts, [the Idaho lower and appellate courts, as well as the U. S. District Court and Circuit Court of Appeals], had heard *argument* on the merits as to the meaning of the "undertaking", and delivered *five* opinions, **not one judge ever intimated that the Surety Co. became supersedeas for Anderson or that the judgment against him had been stayed.**

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* As both Clauses A and B limit the "damages and costs," to such as "may be awarded against the appellant, *Singer Co.,* upon the appeal", even the Baldwins concede that they cannot, and they have not attempted to, recover from the Surety Co. the "damages and costs" awarded against *Anderson.* The Baldwins assert, however, the anomalous claim that, although the Singer Co. was *dismissed* from the suit, nevertheless the Surety Co. guaranteed that the Singer Co. would pay the *judgment* against Anderson, but *not* the "damages and costs" against him, while, at the same time, the Singer Co. recovered $488.55 costs against the Baldwins. (R. 16.)

On the contrary, four opinions expressed the views of *six* judges that the Surety Co. never bound itself for Anderson, but only for the Singer Co., and that no judgment should be rendered against the Surety Co. (Koelsch, *J.*, No. 21, pp. 153-165; C. C. A. No. 21, pp. 257-260; Budge, *J.*, dissenting, R. 55-63; Leeper, *J.*, dissenting, 13 Pac. (2) 652).

The views of KOELSCH, *J.*, and BUDGE, *J.*, are so persuasive that some of the more important parts of their opinions are now reproduced:

KOELSCH, *J.*, after reviewing various authorities, said (No. 21, 163):

> "In the bond under consideration in the case at bar, the nouns and pronouns referring to the appellant are *all in the singular*, and the *verbs* correspond *therewith*. . . .
>
> "This preamble says nothing about the appeal on the part of the defendant Ed. Anderson; it speaks only of the appeal by the Sewing Machine Company. It will also be noticed that it refers to the judgment as a 'judgment made and entered against it.' If this thought be kept in mind, it is logical to conclude that in the phrase expressing the desire of staying execution of 'said judgment,' it likewise referred only to the judgment in so far as it concerned it, and it alone.
>
> "But thus far I have considered only the preamble, which after all, does not constitute the contract on the part of the surety. And while this preamble (as well as the notice of appeal, etc.) may be considered, and in case of doubt, might solve the doubt, the contract of the surety must be ascertained from the condition and the obligation of the bond. And here, the language of the bond under consideration is even more explicit in its limitation to the Singer Sewing Machine Company, as a single appellant: [Quotation of bond omitted. See pp. 16, 17, *supra*.]
>
> "This language, it seems to me, is far more explicit than that found in the bond considered in *Thomas* vs. *Lee*, and

more certain even than that contained in the bond considered in *Bergevin* vs. *Wood*. And, certainly, when construed in the light of the rule laid down by the cases that a surety is entitled to strict construction of his undertaking, the bond leaves no room for doubt that it was intended, and in effect, is, a bond only on behalf of the appellant Singer Sewing Machine Company."

BUDGE, *J.* (R. 59);

"The supersedeas bond upon its face and throughout its contents shows clearly that it was given to stay execution upon the judgment and the whole thereof entered against the Sewing Machine Company. Anderson's name nowhere appears in the bond, and in order to uphold the judgment entered upon the supersedeas bond it becomes necessary for the court to read into the bond that it was given to stay execution of the judgment against Anderson as well as against the Sewing Machine Company. This the court has no authority to do.

It is fallacious to contend that under a judgment joint in form but in fact and in law joint and several against two or more defendants, a stay of execution on such judgment in favor of one of the defendants pending an appeal is a stay of execution as against all of the defendants. It is likewise illogical to contend that a supersedeas bond stays proceedings in favor of a person not named in the bond. Appellants were in a position at any time from the entry of the original judgment against the Sewing Machine Company and Anderson to execute upon the judgment against Anderson, the latter having furnished no supersedeas bond. C. S. secs. 7155, 6902 (amended, Sess. Laws 1929, p. 70); 23 C. J., p. 533; 3 C. J., p. 1324, Sec. 1451; 2 Cal Jur., p. 472, Sec. 222; *Drahant* v. *Cure* (Pa.), 124 At. 340; *State* v. *Beveridge* (Or), 218 Pac. 1112; *Bergevin* v. *Wood* (Cal.), 105 Pac. 935; *Ex parte French*, 100 U. S. 1.

The supersedeas bond is the foundation of the judgment obtained thereon and must be interpreted from its

four corners. The surety is entitled to have his bond strictly construed. His liability cannot be extended by implication. He has a right to stand upon the exact words of his contract, and his liability is limited to the language of his bond. (*City of Pocotello* v. *Fargo*, 41 Ida. 432, *Jackson* v. *Barrett*, 12 Ida. 465).

With this principle in mind the bond should be examined for the purpose of determining whether the court had jurisdiction to enter the particular judgment. The court must not only have jurisdiction of the person and the subject matter but power and authority to render the particular judgment. In the opening of the bond we find this language:

> 'Whereas, the defendant Singer Sewing Machine Company, a corporation, in the above entitled action has appealed to the Supreme Court of the State of Idaho from the judgment made and entered against it in the above entitled action in the above entitled court in favor of the plaintiffs in said action . . . and from the whole of said judgment.'

The whole of said judgment against the Singer Sewing Machine Company, not the whole of the judgment against Anderson. Anderson is an entire stranger to the American Surety Company. That he was never thought of when the supersedeas bond was given is a fact apparent from the entire record. To read his name into the bond or to create a liability against the American Surety Company by reason of the fact that the judgment was rendered against Anderson and the Singer Sewing Machine Company is to do violence to the language of the bonds. No language could be plainer to my mind, from a reading of the bond, than that it was the intention of the American Surety Company to furnish a supersedeas bond for the Singer Sewing Machine Company alone. Had it intended to furnish a bond for both the sewing machine company and Anderson, language would have been used to that effect. It names the Singer Sewing Machine Company in its bond, it refers

to the judgment entered against the Sewing Machine Company in its bond, and the bond is given to stay execution against the whole of the judgment entered against the Sewing Machine Company. This is further emphasized by the next paragraph of the bond, which is as follows:

> 'And whereas, the said appellant, Singer Sewing Machine Company, a corporation, is desirous of staying the execution of said judgment so appealed from.'

What judgment? The judgment appealed from by the Singer Sewing Machine Company. We must look to the whole instrument to gather the intention of the parties, the preamble as well as the condition of the bond, and particularly is this true where there is doubt. The condition of the bond is even more explicit than the preamble in limiting liability on the bond to a stay of execution against the Singer Sewing Machine Company. It is as follows:

[Quotation omitted here. See p. 17, *supra.*]

It affirmatively appears from the condition of the bond as above set out that the bond was given solely for the purpose of staying execution against the Singer Sewing Machine Company, with the amount of the judgment payable only in the event the judgment against the Singer Sewing Machine Company or any part thereof be affirmed. If the judgment against the sewing machine company had been affirmed in part the bond would be answerable to the extent of the affirmance."

## III.

If this Court now construes the "undertaking" to mean that, in order to stay execution against the Singer Co., the Surety Co., agreed to pay any judgment that might be affirmed as against *Anderson,* then the Surety Co. consented in advance to a judgment against itself for the

*Anderson* judgment, and it has no cause for complaint that the judgment which it had agreed to, should be entered without further notice to it.*

But if, on the other hand, this Court construes the "undertaking" to mean, as we contend it means, that the Surety Co. only consented, in advance to a judgment against itself for any amount which might be affirmed as against its principal, *Singer Co.* then obviously it did not consent in advance to a judgment against itself for the Anderson judgment.

Thus, again, the vital question in this case is the construction which this Court gives to the supersedeas "undertaking."

If it shall be construed as we contend for, then we pass to the next question, namely, what is the result of an unauthorized judgment against the Surety Co. without any summons upon, or notice to it, *before* the rendition of such judgment?

II. *The ex parte judgment of June 23, 1930 against the Surety Co. was absolutely void for lack of summons or notice to it.*

The record here shows no summons or other notice to the Surety Co.; and it is conceded by all that no summons or notice was given it of the proposed *ex parte* judgment.

* The Baldwins contend that the judgment against the Singer Co. and Anderson was an "*indivisible*" judgment; that, hence, a *supersedeas* to stay execution against the Singer Co., necessarily stayed execution against Anderson; and that the Surety Co., thereby, bound itself to pay the "indivisible" judgment if affirmed in part.

The Idaho Supreme Court answered that contention by dividing the so-called "indivisible" judgment, affirming as to Anderson and reversing as to the Singer Co. (49 Idaho 231).

A personal money judgment cannot be rendered against a corporation unless it has been personally served with process within the State rendering the judgment, or has, in some way, consented to a waiver of process and agreed that judgment may be rendered against it.

If then, we are right in our contention (p. 16, *supra*) that the *supersedeas* "undertaking" did not give the Surety Co.'s consent in advance to a judgment against it for the *Anderson* judgment, it follows that the *ex parte* judgment of June 23, 1930, was absolutely void.

In *National Exchange Bank* v. *Wiley*, 195 U. S. 257, Wiley gave to the Exchange Bank a note which authorized a confession of judgment in favor of any *holder* of the note. The Exchange Bank obtained a judgment against Wiley in an Ohio State court by use of that authority. The Exchange Bank then sued Wiley in Nebraska on the Ohio judgment. Wiley defended in Nebraska on the ground that when the Ohio judgment was recovered, the Exchange Bank was not the holder, as it had previously sold the note to the Tiffin Bank. This Court held that the Ohio judgment was not even protected by the "full faith credit and clause" against an inquiry as to whether the consent Wiley gave had been exceeded in the obtention of the Ohio judgment; and that the Ohio judgment was not authorized, as the Exchange Bank was not the *holder*, saying (p. 268):

> "In other words, the defendant Wiley could show collaterally that he was not legally before the court—as he was not, in any just sense—if his appearance was entered and judgment confessed by one who had in fact, at the time, no authority to do either; and, consequently, that

> the court was without jurisdiction to proceed except on legal notice to him, or without his appearance in person or by an attorney authorized to represent him. If law and usage in Ohio were to the contrary, then such law and usage would be in conflict with the Constitution of the United States; for it is thoroughly settled that a personal judgment against one not before the court by actual service of process, or who did not appear in person or by an authorized attorney, would be invalid as not being in conformity with due process of law."

and also at page 270:

> "It was, in such case, in legal effect, a personal judgment without service of process upon the defendants, and without their appearance in person or by an authorized attorney. The proceedings were wanting in due process of law. The obligors never consented to judgment by confession in favor of one who was not the owner of the note or entitled to receive its proceeds, and the warrant of attorney cannot be held to have authorized such a confession."

As there, so here; The question is whether a certain written instrument, *i. e.*, the supersedeas, authorized an *ex parte* judgment for the *Anderson* debt. In the *Wylie* case, this court held that the instrument in question did not authorize in advance the entry of the *ex parte* judgment; that the question could not be decided in Wylie's absence; and that he could collaterally attack, as void, any judgment based upon a supposed consent which in fact he had not given. Similarly, if the Surety Co. had been sued in New York on the Idaho *ex parte* judgment, it could have defended by showing that it had not consented to a judgment for *Anderson's* debt, but only for the Singer Co.'s.

Here the supersedeas "undertaking" did not give the Surety Co.'s consent that an *ex parte* judgment might be rendered against it for the *Anderson* judgment; and the Surety Co. has the right collaterally to attack the June 23d judgment as void. But it would not do the Surety Co. any good to collaterally attack the judgment, because its $25,000 Liberty Bonds had been seized in Idaho under the judgment. So it attacked the judgment (1) directly in the Idaho courts, and (2) by injunction proceedings in the Federal courts to restrain the enforcement of the void judgment.

The supersedeas "undertaking" presents the justiciable question whether the Surety Co. guaranteed the *Anderson* judgment. To the extent that the "undertaking," properly construed, gave the Surety Co.'s consent in advance to the entry of a judgment against it, the Surety Co. became such a party to the suit as to give the Idaho courts jurisdiction over the Surety Co.'s person so as to render an *ex parte* judgment *so far as it was authorized by the supersedeas undertaking.* But when the Baldwins undertook to secure, *without notice* an *ex parte* judgment against the Surety Co., they did so *at their peril,* if it should ultimately turn out that the *ex parte* judgment was not authorized by the *supersedeas* "undertaking."

It was at that point that the Baldwins fell into the pit which they had prepared for the Surety Co. (p. 2, *supra*).

If the Surety Co. had been notified (with or without formal service of process) of the intention to hold it under the *supersedeas* "undertaking" for the *Anderson* judgment, and it had been given an opportunity to be heard on that subject *before* the rendition of the judgment, and the Idaho

courts had construed the *supersedeas* "undertaking" as giving the Surety Co.'s consent in advance to a judgment against it for the *Anderson* judgment, the Surety Co. would have had its day in court, the "due process" requirements of the Federal Constitution would probably have been fulfilled, and perhaps the Surety Co. would have had no ground for complaint under the Federal Constitution.

But the Surety Co.'s "undertaking" did not give to the Idaho courts jurisdiction over the Surety Co.'s person to render an *ex parte* judgment conclusive and beyond attack, if it should ultimately be held that the Idaho courts' *ex parte* construction of the "undertaking" was erroneous.

A court cannot acquire jurisdiction over the person of a defendant, by deciding *ex parte* that it has such jurisdiction, if in a subsequent proceeding the defendant can show that no such personal jurisdiction existed.

In *Chicago Life Insurance Co.* v. *Cherry*, 244 U. S. 25, 29, Mr. Justice HOLMES said;

> "A court that renders judgment against a defendant thereby tacitly asserts, if it does not do so expressly, that it has jurisdiction over that defendant. But it must be taken to be established that a court cannot conclude all persons interested by the mere assertion of its own power (*Thompson* v. *Whitman*, 18 Wall 457) even where its power depends upon a fact and it finds the fact (*Tilt* v. *Kelsey*, 207, U. S. 43)."

*In its last analysis, any court which assumes to decide (in the absence of a defendant) that it has jurisdiction of his person, always runs the risk of this Court deciding under the "due process" clause, that such court did not have personal jurisdiction over the defendant.*

This discussion, therefore, again brings us back again to the fundamental question: Did the *supersedeas* "undertaking," bind the Surety Co. for the *Anderson* judgment?

This Court's determination of that question, automatically decides whether the June 23d judgment was void or valid.

III. *The Supreme Court of Idaho can not deprive the Surety Co. of its right to Federal protection under the "due process" clause, by holding that the Surety Co. should have appealed from, instead of moving to set aside, the June 23d judgment; and that having mistakenly pursued an alleged erroneous procedure for relief, it is remediless.*

The Idaho Supreme Court declined to construe the *supersedeas* "undertaking" or to decide whether it bound the Surety Co. for the Anderson judgment (R. 50, 54).* It simply held (1) that by executing the *supersedeas,* the Surety Co. became a party to the suit, and could be proceeded against to judgment, without notice; (2) that when Judge Koelsch assumed to enter the June 23d judgment he decided, rightly or wrongly, that the *supersedeas* bound the Surety Co. for the *Anderson* judgment; (3) that the judgment so entered was not void, and the Surety Co.'s remedy was by *appeal* and not by immediate motion to set aside, as Judge Koelsch had no power to set aside a judgment after once entering it (R. 50, 54).

Such a position must be rejected, because: 1. If, as we contend, the June 23d judgment was in fact void for lack of "due process", then this Court has jurisdiction to review

* The Court said:

"We disclaim any intention or right to construe the legal effect of the undertaking . . . The undertaking cannot be examined and its legal effect as to this issue be determined by us on this appeal."

the Federal question by *certiorari* which it has already granted.

2. Relief by *certiorari* can not be defeated on the ground that the Surety Co. *might* have appealed to the Idaho Supreme Court for relief instead of moving to set aside the void judgment. If the judgment was void (as we contend) under the Federal Constitution, it can not be cured by a State Court's queer decision on procedure.

Even if the Surety Co. had appealed, no one knows what the Idaho Court would have done; and the record on such appeal would have been a purely *ex parte* record, cleverly contrived by Mr. Ailshie, in the absence of the Surety Co. to support if possible the judgment he had obtained. Under the "due process" clause, the Surety Co. was entitled to be heard *before* the judgment was rendered, so that it would have an opportunity to get into the record whatever it deemed essential for its protection (*Missouri* v. *North*, 271 U. S. 40, 42; *Dartmouth College* v. *Woodward*, 4 Wheat. 518, 581; *Windsor* v. *McVeigh*, 93 U. S. 277; *Hovey* v. *Elliott*, 167 U. S. 409; *Riverside &c Mills* v. *Menefee*, 237 U. S. 189; *Truax* v. *Corrigan*, 257 U. S. 312, 332; *Hurtado* v. *California*, 110 U. S. 516, 535).

*A hearing limited to an ex parte record, where the injured party had no opportunity to be heard or present his proofs, does not afford "due process of law".*

3. The Surety Co. is not, in No. 3, making a collateral attack on the June 23d judgment. It is making a *direct attack* on it by *certiorari;* it is seeking to reverse a State Court holding that a binding judgment can be rendered when the defendant has not been summoned, nor (as we contend) consented in advance to a judgment for the Anderson debt.

## SECOND POINT [No. 21].

**The Circuit Court of Appeals was right in holding that the Federal Court should enjoin the enforcement of the June 23d judgment.**

The Circuit Court of Appeals held,

1. That when the Surety Co. signed the *supersedeas* bond it became, to a certain extent, a party to the *Baldwin* suit and was bound by subsequent proceedings, even though erroneously taken against it (No. 21, p. 258; *U. S. F. & G. Co.* v. *Ft. Misery &c. District,* 22 Fed. (2d) 369).

2. That by the *supersedeas* "undertaking," the Surety Co. agreed that judgment might be entered against it, without notice, only if judgment against the *Singer Co.* were affirmed; but that the Surety Co. did not agree that judgment might be entered against it in any other event (No. 21, pp. 257-258).

3. That as the *Singer Co.* judgment was *reversed,* there was no agreement by the Surety Co. to any judgment for Anderson's debt (No. 21, p. 258); and that the June 23d judgment was void (No. 21, pp. 258-260; *Natl. Exchange Bank* v. *Wiley,* 195 U. S. 257).

The jurisdiction of the Federal Courts to enjoin judgments obtained at law in the State courts, where the enforcement of such judgments would be unconscionable is undoubted (*Wells-Fargo & Co.* v. *Taylor,* 254 U. S. 175;

*Simon* v. *Southern Ry. Co.*, 236 U. S. 115; *Marshall* v. *Holmes*, 141 U. S. 589; *Exchange Natl. Bank* v. *Joseph Reid Co.*, 287 Fed. 870; *Natl. Surety Co.* v. *State Bank*, 120 Fed. 593).

Even if the *ex parte* judgment of June 23, 1930 was not technically void for lack of process, the Federal courts have the power to enjoin its enforcement where:—

(a) it is unconscionable;

(b) the injured party had no actual notice and has had no opportunity to defend, through no fault of his own; and

(c) the injured party has no adequate remedy at law *in the Federal courts.*

The alleged remedy suggested by the Supreme Court of Idaho of appeal on an *ex parte* record, without opportunity to the injured party to present his proofs, not only violates the 14th Amendment but certainly does not afford an adequate remedy at law.

This case then comes back to the same points discussed in No. 3.

If the June 23d judgment was void, because the Surety Co. never agreed that a judgment might be entered up against it for *Anderson's* debt, then the Federal Courts ought to enjoin the enforcement of it.

The Surety Co. has not asked the Federal Courts to overrule or to reverse a State Court's interpretation of a *supersedeas* given under a State statute. The State courts *refused* to interpret it.* Therefore the Surety Co. insists, that, *in the absence of any Idaho State Court construction*

*of the supersedeas,* the Federal Court interpret it; and if it concludes that the Surety Co. did not agree to a judgment against itself for Anderson's debt, then that the Federal Courts shall hold that the judgment was void for want of process or consent; that "due process" was denied to the Surety Co., and that the Idaho judgment be reversed and/or the Baldwins enjoined from enforcing it.

**WILLIAM MARSHALL BULLITT,**
**OLIVER O. HAGA,**
**McKEEN F. MORROW,**
**ALLAN C. ROWE,**
Counsel for American Surety Co.

October 4, 1932.

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* Except Judge Koelsch who said it did not bind the Surety Co. for the Anderson judgment.

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CHARLES ELMORE

No. 21

IN THE

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1932**

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VIVIAN F. BALDWIN and E. R. BALDWIN,
*Petitioners,*

vs.

AMERICAN SURETY COMPANY OF NEW YORK,
a Corporation,

---

**On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit**

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## Brief for Petitioners

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JAMES F. AILSHIE, JR.,
J. R. SMEAD,
*Counsel for Petitioners.*

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IN THE

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1932**

---

VIVIAN F. BALDWIN and E. R. BALDWIN,
*Petitioners,*

vs.

AMERICAN SURETY COMPANY OF NEW YORK,
a Corporation,
*Respondent.*

---

## Brief for Petitioners

---

### OPINIONS BELOW

The opinion of the Supreme Court of Idaho is reported in Baldwin v. Anderson and Am. Surety Co., 50 Idaho 606.

The opinion of the Ninth Circuit Court of Appeals is reported in 55 Fed. (2d) 555.

The opinion of the United States District Court for the District of Idaho is reported in 51 Fed. (2d) 596.

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The opinions of the Supreme Court of Idaho in two other proceedings by respondent, had in the State courts concerning the subject matter here involved (a State court judgment against this respondent) and in part relied on by petitioners here to show a waiver of lack of due process, if any existed, are reported as follows:

Baldwin v. Anderson, et al., ..... Idaho .....
(Not yet officially reported.) 8 Pac. (2d) 461.
Baldwin v. Anderson, et al., ..... Idaho .....,
..... Pac. (2d) .....
(Final judgment September 10, 1932.)

## JURISDICTION

The Circuit Court of Appeals entered judgment herein January 18, 1932.

Petition for certiorari was filed March 21, 1932. The writ was granted April 25, 1932.

Jurisdiction is thought to be conferred by Section 240 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stats. 938.

## QUESTIONS PRESENTED

As to whether the Circuit Court of Appeals erred in refusing to follow the rules of State law announced by, and the decision of, the Supreme Court of Idaho on the question as to construction, meaning and effect of a supersedeas undertaking filed in an Idaho trial court in conjunction with an appeal from a money judgment therein to the State Supreme Court; on the further question, as to the effect of filing the same as making the obligor thereunder a party to subsequent proceedings; and on the question of the jurisdiction of the State trial court to entertain, thereafter, a motion for judgment on such undertaking without further or special notice to the obligor who had theretofore executed and filed the same.

Also, as to whether the Circuit Court of Appeals was in error in holding that such motion for judgment was entertained, and thereafter the undertaking construed and judgment entered thereon, without due process of law.

Also, as to whether the Circuit Court of Appeals failed to give full faith and credit to the judgments of the State courts.

## STATUTES INVOLVED

The statutes are reproduced in Appendices A, B and C, *infra*, pp.

## STATEMENT

Petitioners commenced an action for damages in the District Court of Ada County, State of Idaho, against the Singer Sewing Machine Company and Ed Anderson, which resulted in the entry of judgment, May 31, 1928, in favor of petitioners and against defendants Singer Sewing Machine Company and Ed Anderson, jointly, with no several liability adjudged against either of them. (R. 33) Thereafter, on August 27,

1928, the said two defendants gave a *joint* (not joint and several) notice of appeal to the Supreme Court of Idaho, which notice recited that the appeal was from the judgment "* * * and from the whole thereof." (R. 35)

Two days later, the American Surety Company (respondent herein) appeared in the action and filed its supersedeas undertaking, pursuant to Section 7155, Idaho Compiled Statutes, (Appendix A) conditioned that whereas the joint appeal was from the *whole* of the judgment, execution should be stayed as to the judgment *so appealed from* and that "* * * if the said judgment appealed from, or any part thereof, be affirmed * * *" the said judgment would be paid; and if not paid within thirty days after the filing of the remittitur of the Supreme Court of Idaho "* * * judgment may be entered on motion of the respondents in their favor and against the undersigned surety for the said sum* * *." (R. 19)

This undertaking was not the ordinary contract of principal and surety and was not signed by any one as principal (R. 21) but was, as construed by the Supreme Court of Idaho, "* * * a complete, independent contract. The obligation of its maker (the surety company) is not collateral or secondary." (R. 52) Upon appeal to the Supreme Court of Idaho, the judgment was affirmed as to the defendant Anderson and reversed as to the Singer Sewing Machine Company, (Baldwin v. Singer Sewing Machine Company, et al., 49 Idaho 231) remittitur being filed in the trial court May 22, 1930. (R. 26)

June 23, 1930, (more than thirty days having elapsed since the filing of the remittitur and the judgment being unpaid) petitioners appeared and moved the trial court to enter judgment in their favor and against the American Surety Company, which motion was granted and judgment was entered in favor of petitioners and against the American Surety Company in the sum of $22,357.20, together with interest thereon, and a provision "* * * that the plaintiffs have execution therefor." (R. 24) Execution was immediately issued and levied by the sheriff of Ada County the following day.

Three days later, the American Surety Company, through its counsel, appearing generally, (R. 35, 36, 39) moved to vacate and set aside the judgment upon the grounds that it was void, that its enforcement was contrary to good conscience and equity, and that the judgment was entered without notice to the American Surety Company or the Singer

Sewing Machine Company. (R. 36) In the same instrument the surety company moved the court to stay all proceedings under execution upon said judgment. (R. 38) The motion was made and based upon all the records and files in the action and a copy of the supersedeas undertaking attached to the motion. (R. 38-39) August 12, 1930, the trial court entered an order declaring the said judgment of June 23, 1930, void, and quashing the execution proceedings thereunder, from which petitioners appealed to the Supreme Court of Idaho. (R. 42)

Upon that appeal to the Supreme Court of Idaho, the surety company stipulated as to the papers to be included in the transcript on appeal, and stipulated to the correctness of the transcript. (R. 43-46) In the Supreme Court of Idaho, the American Surety Company, appearing generally, submitted the cause orally and upon briefs. (Baldwin v. Anderson, 50 Idaho 606, 613.) Thereafter the Supreme Court of Idaho, Justice McNaughton delivering the opinion, rendered its judgment, reversing the trial court, declaring the supersedeas undertaking was the complete, independent contract of the surety, and not collateral or secondary, and declaring that the judgment of June 23, 1930, was not void. (R. 47) The surety company's petition for rehearing was denied and the remittitur of the Supreme Court filed in the trial court June 3, 1931. (R. 65)

On June 17, 1931, respondents again caused to be issued a general execution against the American Surety Company (R. 94) pursuant to which United States bonds in the sum of $25,000.00 deposited by the surety company with the treasurer of the State of Idaho, as provided by law, were levied upon and sale of the same to satisfy execution was set for August 5, 1931. (R. 92) The long period elapsing between the date of the execution and date of sale was due to Section 5104, Idaho Compiled Statutes, (R. 96) which requires that securities deposited with the State Treasurer by a foreign surety company cannot be sold until 40 days' notice is given to the surety at its home address.

Upon the day following the issuance of the execution, the surety company filed in the State District Court a motion *to amend and correct the judgment* of June 23, 1930, and to vacate said judgment as amended. (R. 69) In this proceeding the surety company again appeared generally (R. 69, 72)

and supported its motion by a lengthy showing of fact, going into the whole proceeding which led to the entry of judgment against it. (R. 72-91)

The bill of complaint herein was not filed in the United States District Court for the District of Idaho until July 6, 1931. (R. 1) It prayed for an injunction against petitioners *and the sheriff of Ada County, Idaho*, restraining them from levying or attempting to levy upon any property of the American Surety Company or otherwise attempting to collect the judgment of June 23, 1930, (R. 16) and allegations were made that the decision of the Supreme Court of Idaho, dated May 2, 1931, was erroneous (R. 10) that the said judgment of June 23, 1930, was void for want of jurisdiction, and that according to the conclusions of the pleader, petitioners had committed fraud in merely presenting their motion for judgment. (R. 6) July 13, 1931, the motion to amend and vacate the judgment was overruled and denied by the state trial judge (R. 132-133) and on the same day a notice of appeal to the Supreme Court of Idaho from the said judgment of June 23, 1930, was served and filed by the surety company. (R. 122) Two days later the surety company served and filed its notice of appeal to the Supreme Court of Idaho from the order denying its motion to amend and vacate the judgment. (R. 126) In all of these proceedings, the surety company appeared generally. No supersedeas or undertaking to stay execution of the judgment on appeal to the Supreme Court of Idaho was filed, although the Idaho statutes permitted the company to do so as a matter of right; Section 7155, Idaho Compiled Statutes. (Appendix A)

The surety company's motion for temporary injunction was heard July 28, 1931, (R. 192) in the United States District Court, after the surety company's appeal from the state court judgment had been taken and after its motion in state court to amend that judgment had been denied and it had taken a second appeal from that denial to the Supreme Court of Idaho. (R. 122, 126) The hearing was had upon the bill of complaint, (R. 1) petitioners' (defendants therein) showing in opposition thereto, (R. 29) and the surety company's rebuttal showing, as well as upon petitioners' motion to strike from the bill (R. 146) and motion to dismiss. (R. 144) On July 31, 1931, Federal Judge Cavanah handed down his memorandum opinion (American Surety Company v. Baldwin,

51 Fed. (2d) 596) (R. 183) and in conformity therewith, on August 1, 1931, entered an order denying the surety company's motion for a temporary injunction and sustaining and granting defendants motion to strike and granting defendants motion to dismiss the bill of complaint. (R. 192) The same day, upon the refusal of the surety company to plead further, a final decree was entered, dismissing the bill with prejudice, (R. 194) from which appeal was taken to the United States Circuit Court of Appeals for the Ninth Circuit. (R. 206)

August 14th, 1931, on application of the surety company (R. 223), and over the objections of your petitioners,, (R 232) the Circuit Court of Appeals entered a temporary restraining order pending appeal. (R. 236)

January 18, 1932, the Circuit Court of Appeals filed its opinion and judgment reversing the trial court's final decree of dismissal, and directing that a temporary injunction be issued by the trial court. (R. 250, 266) The order of the trial court, sustaining the motion to strike from the complaint was not, however, disturbed.

In reversing the lower court, the Circuit Court of Appeals in effect expressly reversed the decision of the Supreme Court of Idaho of May 2, 1931, in the following language:

> "This view is inconsistent with the decision of the Supreme Court of Idaho, but the majority of the court there assumed upon the appeal in question that the surety was in court at the time of the hearing of the motion for judgment against it and that therefore the court not only had jurisdiction of the subject matter of the judgment but of the parties and that its decision, although erroneous, was not void." (R. 260)

The Circuit Court of Appeals further held that the Singer Sewing Machine Company was the principal in the supersedeas under consideration (R. 260), in conflict with the construction placed upon Section 7155, Idaho Compiled Statutes, by the Supreme Court of Idaho, which held that the contract of the surety was a separate, independent obligation of the surety company through which it made its voluntary appearance in the State District Court and thereby became a party to all proceedings thereafter. (R. 52) The Circuit Court of Appeals further held that the giving of judgment

was "in violation of the Federal Constitution" (R. 260), and declined to give full faith and credit to the judgment of the Supreme Court of Idaho, (R. 256) or consider the decision of the Supreme Court of Idaho *res judicata*.

Petition for rehearing was filed in the Circuit Court of Appeals which was denied February 23, 1932 (R. 266), and upon application (R. 267) a stay of mandate was ordered. (R. 268)

## SPECIFICATIONS OF ERRORS TO BE URGED

I.

The Circuit Court of Appeals erred in refusing to accept and follow the interpretation and rules of State law announced by the Idaho Supreme Court in its decision.

II.

The Circuit Court erred in refusing to accept the judgment of the State trial court, which was unmodified and unreversed, and which is now a final judgment, as res judicata concerning the construction, meaning and effect of this respondent's contract.

III.

The Circuit Court erred in holding, in effect, that Federal courts may review the decisions of State courts for error in matters of State law and statutes.

IV.

The Circuit Court failed to give full faith and credit to the judgment of the Idaho Supreme Court, and to the judgment of the State trial court.

V.

The Circuit Court erred in holding that the judgment here in question was entered without due process of law.

VI.

The Circuit Court erred in failing to hold that, if there were any lack of due process originally, the respondent had waived it and submitted to the jurisdiction of the State courts for all purposes of the proceedings therein.

## SUMMARY OF ARGUMENT

### Assignments of Error I-IV

The supersedeas undertaking in question accompanied a strictly joint appeal to the Idaho Supreme Court from a joint judgment in the original case, which in no sense adjudged a several liability against either judgment debtor. (R. 33-35)

Doremus v. Root, 23 Wash. 710.

The State Supreme Court took note that the *nature* of that appeal was one of the premises on which the next appeal, from the judgment on the supersedeas undertaking, was there presented. (R. 50) This last is the judgment involved here.

The judgment debtors in the original case were privileged to stay execution pending that appeal solely because of a State statute, Idaho Comp. Statutes, Section 7155. (App. A) The American Surety Company, respondent here in this, Case No. 21, likewise exercised a privilege extended to it by the same statute. Presumably for a monetary consideration which it deemed sufficient, it executed its contract running to the judgment creditors (petitioners here) which the statute denominates a "supersedeas undertaking". That contract discloses on its face that it was the obligation of the American Surety Company alone. (R. 21) Accordingly, the State Supreme Court held that the undertaking was the independent contract of the surety, and that the obligation thereof was neither collateral nor secondary. The court also cited in support of that rule the California court, from which state Idaho's Section 7155 was adopted. (R. 52)

The Idaho court also held that by filing its supersedeas undertaking in the case, the surety company became a party to the action, and cited numerous decisions, both State and Federal, to the same effect. (R. 51-52)

We submit that the proceedings provided by the Idaho statute (App. A) pertain wholly to the State courts, and have neither reference nor relation to, nor depend upon, the Federal law, either constitutional or statutory. A contract such as the undertaking in question, exists and has its effect wholly by virtue of State law. The filing thereof in the case, and subsequent action taken therein with reference thereto, are matters of procedure in the State courts. We therefore submit that the State courts were fully empowered to consider

and determine the legal meaning and effect of the terms of that undertaking, and to determine, *as between the parties to that litigation,* whether or not the surety company's obligation rendered it liable thereon.

The facts, we believe, bring the case within the rule announced by this court in Ramsey-Gatlin Const. Co. v. Vincennes Bridge Co., 283 U. S. 796, where it was said:

> "*Per Curiam:* As it appears from statements at the bar that the contract herein and the bond given pursuant thereto were made and the obligations thereof were to be performed within the State of Kentucky, and as the bond should be construed in accordance with the law of that state, and it appearing that, since the certification herein, the Court of Appeals of Kentucky has construed the bond in question and decided that one in the position of the appellee in the court below, as a sub-contractor, was entitled to avail itself of the provision in the bond and maintain its action (*Aetna Casualty & Surety Co. v. Wheeler & Putnam Co.,* decided March 27, 1931, 236 Ky. .....) the Court is of opinion that there is no occasion for an answer by the Court to the question propounded in the certificate."

Further, we think it is obvious that the State trial court, being the only court in which the undertaking *could* be filed, and in which it reposed during the appeal to the Supreme Court, and to which the State statute required the judgment creditor to address his application for judgment on the undertaking, *was the only court in existence which had any vestige of jurisdiction to consider and judicially determine the meaning and effect of the contract* between the surety and the judgment creditors.

After entering judgment on the contract, the trial court, on the surety company's motion, declared such judgment void, and ordered it vacated. The State Supreme Court reversed that order. The surety company then commenced this suit to enjoin enforcement of the judgment.

The Circuit Court of Appeals stated in its decision, with reference to such decision of the Idaho Supreme Court, as follows:

> "This decision was based on the proposition *that the trial court had no jurisdiction to set aside its judgment*"

(against the surety company) "under the circumstances ****". (R. 252)

This, we submit, was entirely a misconception. The closing words of the State court's opinion are, "the trial court committed *error* ****". (R. 56) The order of the trial court had been that the judgment against the surety was *void*. (R. 41) We believe it is universally settled that any trial court has jurisdiction to consider and determine whether or not its judgment is void, as distinguished from erroneous.

*And see:*

Nixon v. Tongren, 33 Idaho 287;
Armitage v. Horseshoe Bend Co., 35 Idaho 179.

The Circuit Court of Appeals further held that the Singer Company was the principal in the supersedeas undertaking and the surety company merely its surety, stating that the obligation and liability of the surety company on its contract was confined to a judgment against it

"in the event that the judgment *against its principal* was affirmed". (R. 258)

This was strictly in conflict with the decision of the State Supreme Court, above referred to, that the undertaking was the independent contract of the surety company and the liability of the surety company thereunder was therefore neither secondary nor collateral. The State court plainly distinguished the contract in question from the ordinary contract of suretyship, executed by a principal as the primary obligor, and by another as surety and hence a secondary obligor, merely. It also held that the contract presented *a legitimate question for judicial determination* as to liability thereunder. (R. 55-56)

The Circuit Court also held that, under the law of Idaho concerning procedure in the Idaho State courts, the reversal of the original judgment as against the Singer Company worked an automatic dismissal of the surety company from the action, by operation of State law. (R. 258, 260) We say "State law" because none other was there involved. The Circuit Court, in this connection, referred to the Idaho Supreme Court as having merely *assumed* that the surety was still a party to the proceedings at the time judgment against it on

its undertaking was rendered. (R. 260) This also is in direct conflict with the holding of the State court. That court said that the surety company had contended, when in the State Supreme Court,

> "that upon the action being dismissed as to it" (the Singer Company) "such dismissal was also a dismissal as to the surety company. *We cannot accept this view.* The undertaking is a complete independent contract. The obligation of its maker is not collateral or secondary. *Moffat vs. Greenawalt,* (Cal.) 27 Pac. 296. Its obligations are to be determined from the instrument itself. If the contract stayed the whole judgment and promised in consideration thereof to pay any part thereof affirmed in the Supreme Court which remained unpaid thirty days after the remittitur was filed, it remains a party to the action and liable until that obligation is satisfied". (Emphasis ours.)
>
> (R. 52)

The State Supreme Court further said, speaking of the proceeding in the trial court for judgment against the surety:

> "The question or issue presented was, Did the surety company, in its undertaking, become a party liable for every part of the judgment appealed from which might be affirmed by the Supreme Court, or did it stipulate only as to such judgment or part thereof as might be affirmed against the Singer Sewing Machine Company? To answer this question the court must look to the bond. The issue required a construction of the bond as a whole. The trial court had jurisdiction of this question. It construed the bond in favor of appellants and against the surety company. It was not only in the court's power, but it was its duty, to decide the question submitted". (Citing authorities.)

In short, the State Supreme Court held that the Singer Company was not the principal of the surety company in the contract in question, that the surety company's obligations under that contract were to be determined from the undertaking itself and were not necessarily controlled by the reversal of the primary judgment against the Singer Company; that the surety company had become a party to the action

upon coming into court *at the time of filing* its undertaking, and remained a party until the question of its liability on the contract was determined. It also held that because of this, it was not necessary to give notice to the surety company of the subsequent motion for judgment against it, in the lower court. In these holdings the court was supported by like decisions where the same, or a similar, statute has been considered.

Gray v. Cotton, 174 Cal. 256;

Portland Trust Co. v. Havely, 36 Ore. 234;

Jewett v. Shoemaker, 124 Iowa 561;

Meredith v. S. C. M. A. of Baltimore, 60 Cal. 617;

Hawley v. Gray Bros., etc. Co., 127 Cal. 560;

Shannon v. Dodge, 18 Colo. 164.

The Ninth Circuit Court of Appeals has held likewise.

U. S. F. & G. Co. v. Fort Misery Highway District, 22 Fed. (2d) 369, 373.

The Federal District Court for Idaho followed the Ninth Circuit Court of Appeals.

American Surety Co. v. Baldwin et al., 51 Fed. (2d) 596.

*And see:*

Pease v. Rathbun-Jones Eng. Co., 243 U. S. 273, 279.

The cases there cited were, in principle, the same as the case at bar. They were:

United Surety Co. v. Am. Fruit Prod. Co., 238 U. S. 140;

Johnson v. Chicago & P. Elev. Co., 119 U. S. 388, 400-401.

The Circuit Court of Appeals has unquestionably, we submit, reviewed and reversed the decision of the Idaho Supreme Court. If so, we believe it was not so authorized.

"Lower Federal courts are not superior to State courts."

Lion Bonding & S. Co. v. Karatz, 262 U. S. 77;
Nickel v. Cole, 256 U. S. 222;
Enterprise Irr. Co. v. Farmers, etc. Canal Co., 243 U. S. 157;
Fauntleroy v. Lum, 210 U. S. 230;
Arrowsmith v. Harmoning, 118 U. S. 194;
Grignon v. Astor, 2 How. 319.

State courts may place their own construction on the *effect* of a given step taken in an action, *particularly as to the effect of an appearance* in the case.

Kauffman v. Wooters, 138 U. S. 285.

The Federal courts do not review or revise the decisions of State courts. Such judgments are res judicata.

A judgment once rendered, though erroneous, is binding *on the parties thereto.* "In every other forum the reasons for passing the decree are wholly immaterial."

Deposit Bank v. Frankfort, 191 U. S. 499, 512.

Any *right, question or fact* once determined "must be taken as conclusively established". *This is true whether the court of first jurisdiction is a State or a Federal court.*

Idem., Pages 514-516.

"A right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery cannot be disputed in a subsequent suit *between the same parties or their privies,* and even if the suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established so long as the judgment in the first suit remains unmodified". (Emphasis ours.)

Mitchell v. First National Bank, 180 U. S. 471.

"If it were true that the question were in whole or in part one of general law, then the thing adjudicated by the State court, when properly brought to the attention of the" (Fed-

eral) "circuit court would still be conclusive *between the same parties* or their privies." (Emphasis ours.)

Idem., Page 481.

"*Whatever may be the nature of a question* presented for judicial determination—whether depending on Federal, general or local law—if it be embraced by the issues made, its determination by a court having jurisdiction of the parties and of the subject matter *binds the parties* and their privies so long as the judgment remains unmodified and unreversed."

Idem.

*And see also:*

Southern Pac. R. Co. v. United States, 168 U. S. 1.

A final judgment on the merits in a State court is conclusive in the Federal courts as between the parties or their privies, whether the question determined is one of Federal, general or local law.

This is true of any judgment, for instance, of one rendered on demurrer, as much so as if rendered on proof.

The judgment of the State court forecloses all that was litigated and all that might have been under the pleadings and the issues.

Sperry & Hutchinson Co. v. Blue, 202 Fed. 82 (C. C. A.), citing many authorities.

One cannot, in another action in a different court, *deny a jurisdiction to which he formerly submitted himself.*

McGeon v. Scales, 9 Wall. 23.

We think the foregoing authorities demonstrate that the Circuit Court of Appeals was in error in reviewing and reversing the State court, particularly since such review involved, and such reversal depended upon, the Circuit Court's refusal *to accept the rules of State law* announced in the State court's decision, which pertained entirely to the State statute and to the law of procedure in the State courts.

Nor is there any distinction to be drawn between this case and others, from the proposition that the judgment against the surety company was a consent judgment, if indeed it may properly be termed such. Assuming that it may, in spite

of the fact that the procedure and the judgment was fixed and authorized by a State statute rather than by the voluntary act of the surety company, still the situation is not altered. We should perhaps interpolate at this point, that we are not directing this portion of the brief specifically to the question of due process. While we believe the authorities which we here cite, particularly the decisions of this court, have an important bearing on that question, we deal directly with it in the next section of the brief. Referring now to the matter of consent judgments, we call attention to the following authorities, showing that consent judgments are not materially different from any other, and that if erroneous they are properly to be corrected by appeal or by like proceedings in error, particularly if it be so held by the appellate court of a given State.

A consent judgment "is obviously something more than a contract, being rather the result of a contract and its embodiment in a form *which places it and the matters covered by it beyond further controversy.* ****** Such a judgment is substantially the same as any other judgment rendered in ordinary course, and is entitled to the same presumptions. ****** It is equally conclusive as to the matter adjudicated, is not subject to collateral attack except on jurisdictional grounds, and is entitled to full faith and credit in a sister state." (Emphasis ours.)

Freeman (5th Ed.) Judgments, Sec. 1350.

A judgment on consent is binding, whether it follows the terms of the consent or not.

Semple v. Wright, 32 Cal. 659, 667;

Neilson v. Emerson, et al., 67 Cal. App. 1239.

A consent decree is reviewable on appeal as to whether the consent was in fact given, or as to whether something has been inserted, as by consent, which was not consented to.

Harding v. Harding, 198 U. S. 317, 335.

The fact that a State appellate court holds that a consent decree is reviewable on appeal, is conclusive in the Federal courts.

Idem., Page 336.

Judgment on a supersedeas undertaking, under a statute such as Section 7155 (App. A) is appealable.

Baldwin v. American Surety Co., 50 Idaho 606, 617. (See R. 55)

Hawley v. Gray Bros., 127 Cal. 560, *supra*.

We submit that in the matters hereinabove pointed out, the decision of the Idaho Supreme Court was final, whether correct or erroneous. So, also, was the judgment of the State trial court against the surety company. The only method for correcting error, if any occurred in the lower court, was by appeal as provided by the law of Idaho.

*See* App. C;

McNitt v. Turner, 16 Wall. 366;

Mohr v. Manierre, 101 U. S. 417;

Thaw v. Ritchie, 136 U. S. 519;

Simmons v. Saul, 138 U. S. 439;

Reinach v. Atl. etc. R. Co., 58 Fed. 43.

Finally, we submit that the Circuit Court of Appeals in part misconceived, and in part definitely refused to accept, the law of the case as theretofore announced in the opinion of the State court, and because of that, misconceived the judgment of the Idaho Supreme Court, *which followed from the rules of law announced in its decision*. We submit that thus the Circuit Court reached a conclusion and a judgment in conflict with the Idaho court, and so failed to give full faith and credit to the State court judgment. If so, the judgment of the Circuit Court of Appeals should be reversed.

Harding v. Harding, *supra*, 335-341.

The Circuit Court arrived at the conclusion that the surety company was not in court when judgment against it was granted, that therefore such judgment was rendered without due process of law, no notice of the proceeding having been given the surety, and so held the judgment void, as conclusions drawn exclusively from the propositions stated in the Circuit Court's decision, to-wit, that the Singer Company was the principal under the contract, and that the reversal of the original judgment against it operated, as a matter of law, to dismiss the surety company from the proceedings.

Except for these propositions, in which the Circuit Court came squarely into conflict with the State court, the judgment here in question would not have been rendered. Indeed, the Circuit Court said:

> "We would concur in this opinion" (of the State court) "if the premise were granted that the surety company was in court at the time the trial court entered the judgment against it." (R. 260)

Also, the Circuit Court misconceived the ultimate holding of the State Supreme Court, and such misconception contributed to its judgment. After stating that certain of the former decisions of the Ninth Circuit Court, cited in the opinion, have no application because the judgment in question was without due process of law, and that the surety company did not have its day in the State court, the Circuit Court said as follows:

> "When it" (the surety company) "applied to the State district court to have the judgment vacated, it might have been bound by an adverse decision of that court if one had been rendered were it not for the fact, as subsequently determined by the Supreme Court of the State, that the District Court of the State *had no jurisdiction to consider the question at all;* that the Supreme Court of Idaho alone had jurisdiction to correct the error on appeal". (Emphasis ours.)
> (R. 263)

We submit this as an entire misconception. In passing, it should be noted that the Supreme Court did not characterize the *rendering* of the judgment on the undertaking as error. It merely stated that the judgment could be reviewed *for* error "*if there was error,* only by this court on appeal". (R. 55) The State court also held that the judgment creditors, petitioners here, had a right to submit the question of liability on the undertaking, and, which is more important, *construed* the undertaking to the point of determining and deciding, *that it presented a legitimate question for judicial determination.* Of still more importance in connection with the quotation last above, the Supreme Court emphatically did not hold that the trial court was without jurisdiction to determine whether or not the judgment was void. Finally, if, as the Circuit

Court of Appeals stated, an adverse decision by the trial court on the surety company's motion to vacate the judgment would have been binding on it, surely an adverse decision on that motion by the State court of last resort would be at least equally conclusive. That the State Supreme Court did render an adverse decision on that motion cannot, we submit, be doubted, and in support of this statement we submit its decision in its entirety. (R. 47-56)

In short, both the Federal and State courts are agreed that the surety company and its contract were in court originally, but the Federal Appellate Court has reviewed and reversed the decision of the State Supreme Court as to what, under the laws of the state, would operate to dismiss the surety company. It has placed its own construction upon the State statutes and the contract. That construction is the sole basis for the judgment which the Circuit Court of Appeals entered. In substance, the Circuit Court holds that the State trial court, in deciding the issue presented by petitioners' motion, should have consulted the undertaking and construed it, but that it was not empowered to place thereon its own construction; that the court should have taken the incorrect and misleading recitals of purported fact therein as controlling, instead of considering, as did both the trial and Supreme courts, the *conditions* therein stated upon which the surety company agreed to become liable, and the nature of the judgment and the appeal in the light of the pertinent state statutes.

We further respectfully submit that in all respects above presented, and under the authorities above cited, the Circuit Court was in error in that it exceeded its lawful authority, and in that it failed to give full faith and credit to the rulings, decision and judgment announced and rendered by the Idaho Supreme Court.

## II.

## DUE PROCESS WAS NOT DENIED

### Assignment of Error V

The Circuit Court based its judgment exclusively on the proposition that due process of law was denied the surety company. As we have suggested in the first section of the brief, this conclusion was arrived at through a difference of opinion with the State Supreme Court as to several proposi-

tions of State law which controlled the ultimate decision. The Circuit Court relied almost entirely upon *National Exchange Bank v. Wiley*, 195 U. S. 257. That decision was taken as being based on the proposition that no notice was given Wiley before entering judgment. (R. 258) As we read that decision, and as we think this Court has since pointed out, the infirmity of that judgment lay solely in the fact that, whereas the consent of the maker was limited to a judgment in favor of the *holder* of the note, the plaintiff bank was not such holder, and was therefore a stranger to the contract itself and not entitled to present the issue, as to whether summary judgment might be had on the strength of the consent. Such being the *facts*, it was as though the bank were commencing a new, independent action, and it was therefore necessary to give Wiley notice before proceeding.

Baldwin v. Iowa Traveling Men's Assn., 283 U. S. 522.

In the case at bar, these petitioners were unquestionably the obligees to whom the contract of the respondent surety company ran. All rights under the contract belonged to them. They, and they alone, had a right to submit the issue of liability, and the statute itself provided that such issue should be sumbitted by motion. (App. A) We think it is obvious that these petitioners had a right to their day in court, there to present their claims, whether they were right or wrong. The question presented was purely one of law, and so could be determined only by judicial consideration and decision.

Gray v. Cotton, 174 Cal. 256.

If a judgment creditor may proceed without notice in one case of this type, we submit that he may so proceed in another. His right so to proceed can hardly rest upon the opinion of the surety as to whether or not he is obligated by his contract. Upon so proceeding, if the surety is not obligated, presumably the court will so find. If the court falls into error, it should be corrected by appeal.

Hawley v. Gray Bros., *supra;*

Baldwin v. American Surety Co., *supra;* (R. 55)

Upon this issue, we desire to call attention to a memorandum opinion of the late Judge Dietrich of the United

States Circuit Court of Appeals for the Ninth Circuit, who presided as the trial judge in *U. S. F. & G. V. Fort Misery Highway District*, and whose decision was affirmed by the Circuit Court in 22 *Fed.* (2d) 369, *supra*. This opinion is not contained in the Federal Reporter, but appears at pages 147 to 166, inclusive, in the transcript of the Fort Misery case in the Circuit Court of Appeals for the Ninth Circuit, being Case No. 5158, and is referred to and cited with approval by Judge Cavanah in his memorandum opinion herein. (R. 189) The question under consideration involved the same statute as here.

The language of that opinion is so apt, and we believe correct when applied to the case at bar, that we adopt it as a statement of the position of the petitioners herein.

> "In rendering both the primary judgment and the subsequent judgment upon the bond, it is, therefore, thought the Court was acting in the exercise of its general jurisdiction. By filing the bond purporting to be given under Sec. 7155, the Fidelity Company submitted itself to that jurisdiction. *And that is true whether the bond does or does not constitute a valid obligation.* Plaintiff thus in effect said to the Court that it entered its appearance for an adjudication of its rights and obligations under the bond. Any other view leads to an absurdity. It would operate to limit a court of general jurisdiction to the performance of a ministerial or a clerical, rather than a judicial function. It is a necessary attribute of such a court that it have the power to decide wrong, as well as right, and to determine questions of its own jurisdiction. If the state court has jurisdiction only in the case of a valid bond, and it is without the power preliminarily to determine this jurisdictional question, manifestly it is incapable of rendering a judgment in any case of a bond, which cannot be assailed for want of jurisdiction. *Its judgment could never be final.* ***** *And the same result would follow,* ***** *in case of a general appearance by the Company to resist judgment, for it contends that an invalid bond fails to confer jurisdiction* of the subject matter, as well as of the person. Undoubtedly, it was the duty of the Court not to render judgment upon this bond, if it was without consideration; but some tribunal must have the power to determine whether there

was or was not consideration. As is said in Fauntleroy v. Lum, 210 U. S. 230, 235: 'Under the common law it is the duty of a court of general jurisdiction not to enter a judgment upon a parol promise made without consideration; but it has power to do it, and, if it does, the judgment is unimpeachable, unless reversed.' See, also, to the same effect Burnet v. Desmornes, 226 U. S. 125. The power conclusively to decide whether such a bond is valid must be lodged in some competent tribunal, and clearly I think that power is possessed by the court in which it is filed. A surety thus enters appearance and submits to its jurisdiction both the person and the subject matter. In any other view the judgment so provided for, whether it be in favor of or against the surety, would be a futile thing, for in any case the defeated party could bring a plenary suit either in the same, or some other court, and by pleading the invalidity of the bond, compel an adjudication of that question *de novo*." (Emphasis ours.)

If the reasoning found in this decision of Judge Dietrich is sound, the hypothetical question to which he referred is actually realized in the case at bar. As pointed out in the State Supreme Court's opinion (R. 50-51) the contention of the surety company was, that the preliminary recitals of purported fact with which its contract opens, should govern its obligation, in spite of the fact that those recitals are grossly incorrect and misleading in that they ignore the record fact that the judgment appealed from was strictly a joint judgment and the appeal which the undertaking accompanied was strictly a joint appeal as much controlled by Anderson as by the Singer Company. On the other hand, these petitioners contended that mere recitals of fact in an undertaking never control the obligation, much less recitals which are incorrect and misleading, and that the obligation must be determined from the statement of conditions in the contract, for instance, where, as here, it recites that the appeal in question is from the whole of a joint judgment, calls for a stay of such joint judgment so appealed from, and agrees to pay any part of such joint judgment which may be affirmed. This, we submit, was plainly a question of law. If the State trial court was in error in holding that the

consideration of the surety company's obligation was a stay of the whole, joint judgment jointly appealed from, and that a partial affirmance thereof, such as had occurred, obligated the surety company, we submit that the rule quoted by Judge Dietrich from *Fauntleroy v. Lum, supra,* should have been applied by the Circuit Court of Appeals. The error, if any, should have been corrected on appeal from that judgment, not by a review and reversal thereof in the Federal courts.

The construction of a contract is always a matter of law for the court.

Gray v. Cotton, *supra;*
O'Conner v. West Sacramento County, 189 Cal. 7;
Verdi v. Helper State Bank, 57 Utah 502.

We submit that it can never be determined in advance of the submission of the creditor's motion, whether the surety is or is not obligated under the conditions stated in its undertaking. The first step is the presentation of the motion, and the issue for decision is thus presented. At that time, the surety who filed the undertaking has long ago become a party to the action. The court has jurisdiction then, or never. The consideration and construction of the contract comes later. Therefore, if notice to the surety is required in one instance, it is required in all. Conversely, if not required in all, it is required in none. We submit that to say otherwise, is to say that in an ordinary action on contract, the necessity of serving notice upon the defendant is to be determined by the outcome of the litigation; that if defendant proves to be liable on his contract he was not entitled to notice in the beginning; if it proves he was not liable, he was entitled to notice. The contention of the surety in the present case seems to be, that the State court should first have construed the contract in order to determine whether it had jurisdiction to construe it. This, we submit, is circular reasoning which leads nowhere.

In any event, the State District Court construed the contract in question and adjudged the surety company liable thereunder. That judgment stands unmodified and unreversed. Respondent contends that thee court should have looked to the contract to ascertain whether it had jurisdiction. If so, surely that court could place thereon its own construction. By the respondent's own contention, it was not

entitled to notice because its contract, which long ago merged into the judgment of the State court, obligated it to pay the original money judgment. If the State court had authority to construe the statement of conditions in respondent's undertaking, then the matter is res judicata, the surety is liable on its contract, and was therefore entitled to no notice of the proceeding against it.

Curtis v. Richards, et al., 9 Cal. 33, 38;*

Meredith v. S. C. M. A. of Baltimore, 60 Cal. 617;

Moffat v. Greenawalt, 90 Cal. 368;

Hawley v. Gray Bros. etc. Co., 127 Cal. 560;

Gray v. Cotton, 174 Cal. 256;**

Portland Trust Co., v. Havely, 36 Ore. 234;

Jewett v. Shoemaker, 124 Iowa 561;

Shannon v. Dodge, 18 Colo. 164;

U. S. F. & G. Co. v. Fort Misery Highway District, 22 Fed. (2d) 369. (9th C. C. A., construing Sec. 7155, I. C. S.);

*And see:* Pease v. Rathbun-Jones Eng. Co., 243 U. S. 273, *and cases there cited.*

Further, "the requirements of the 14th Amendment are satisfied if trial is had according to the settled course of judicial procedure obtaining in the particular State and the laws operate on all persons alike and do not subject the individual to the arbitrary exercise of the powers of government."

Minder v. Georgia, 183 U. S. 559, 562.

No one has a vested right in any given mode of procedure, and so long as a substantial and efficient remedy remains due process of law is not denied. When an *opportunity* to be heard is provided, this satisfies the due process clause.

Crane v. Hahlo, 258 U. S. 142, 147.

The surety company should be held to have known the provisions of the statute pursuant to which its undertaking

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*This decision was written by Mr. Justice Field during his term as an associate justice of the Supreme Court of California.

**The several California decisions are cited for the reason that Idaho adopted the statute in question from California.

was executed, and pursuant to which it became a party to the action, by filing the undertaking. Having voluntarily appeared in the action, it surely was the surety's responsibility, and its duty as well, to take notice of the course of the proceedings, the steps taken, and of any limitations or periods of time provided by the statute, within which to act. It had ample opportunity to assert its claims. It had thirty days after the Supreme Court's decision in the original case within which to seek exoneration on its undertaking and its dismissal from the action. (App. A) The judgment creditor could take *no* action until that thirty-day period had passed. This respondent did nothing. Its situation is not, we believe, substantially different from that of a defendant who voluntarily enters an appearance without service of notice upon him, in an ordinary action on contract, and then fails to plead to the complaint, in reliance upon his own opinion that the contract shows that he is not liable. When thereafter the complainant proceeds because of such default, and obtains judgment, we submit that the defaulting party cannot be heard to complain that he was not specially notified of the proceeding for judgment by default.

Here the surety company was proceeded against by the established, statutory course of judicial procedure in the State courts.

After judgment, the surety had for ninety days the right of appeal and again failed to exercise its rights. (App. C) On such appeal, it could have submitted the question of jurisdiction.

Idaho Comp. Stat., Sec. 6693 (App. B);

Hauter v. Coeur d'Alene Min. Co., 39 Idaho 621, 634.

It chose instead to proceed against the judgment by motion. (R. 36-39) After an adverse decision on such motion in the appellate court, it undertook to appeal from the judgment. This appeal was dismissed because not taken within ninety days as provided by the State statute. *Baldwin v. Anderson, et al.,* ..... Ida. ....., 8 Pac. (2d) 461. It also commenced another proceeding in the lower court by which it sought to have the judgment amended. (R. 69-72) It also carried that proceeding to the appellate court and again a final adverse decision was rendered. (At this writing, this decision is not reported.) If it be assumed that the judgment on the undertaking was erroneous, and that it would

have been reversed had not respondent misconceived its remedy, that does not, we believe, have any bearing on the matter of due process. The due process clause does not control forms of procedure, or regulate practice, in the State courts.

Louisville & N. R. Co. v. Schmidt, 177 U. S. 230, 236;
Holmes v. Conway, 241 U. S. 624, 631.

Nor does hardship in an individual case work denial of due process. This is especially true where the party is charged with notice that the particular proceeding is provided for by the statutes of the State.

In the cited case next below, a non-resident of New Jersey acquired property in that State. The State law provided for the attachment of a non-resident's property for debt, and also, that if the property owner wished to appear to defend such an action against the property, he must furnish satisfactory bond guaranteeing the payment of the debt. It was held that this provision was not unconstitutional and did not deprive the owner of due process, particularly because he was charged with notice of that provision of the law when he acquired the property in that State.

Ownbey v. Morgan, 256 U. S. 94, 110, 111.

We believe that, in view of the original appearance of the surety (when its undertaking was filed); its first proceeding after judgment against it, by motion; its attempted appeal from the judgment a year later; and its second motion, also a year later, to amend the judgment, respondent has had its day in court.

Cooper v. Newell, 173 U. S. 556, 568;
Goldey v. Morning News, 156 U. S. 518.

When it first appeared and became a party, it accepted the terms of the statute which permitted its liability, if any, to be determined on summary proceedings by motion. (App. A)

> "That a man may contract to be bound by a judgment in which he has no right to be heard, and that a statute may authorize him to make himself a party to such a judgment, was decided, if it needed a decision, in *Beall v. N. Mex.*, 16 *Wall.* 535, 21 *L. Ed.* 292".
>
> United Surety Co. v. Am. Fruit Prod. Co., 238 U. S. 140.

*See also:*

Johnson v. Chicago & P. Elev. Co., 119 U. S. 388, 400-401.

Finally, we believe that any question of due process, so far as this case is concerned, is eliminated from the case by the decision of this court in *Baldwin v. Iowa Traveling Men's Association*, 283 U. S. 522, *supra*.

Therein, Mr. Justice Roberts, in discussing the question of jurisdiction, said:

> "Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause."

This opinion, so far as we have been able to ascertain, is the latest expression of this Court upon the question and is, we believe, controlling on the question of the State trial court's jurisdiction in the case at bar. Here the American Surety Company voluntarily litigated the question of jurisdiction, as a matter depending on State law as to the effect of its original appearance, and as to the proper meaning and effect of its contract, through the State court of last resort. It approached the question of jurisdiction again, from a different angle, in its motion to amend the judgment against it, in that it there sought first to have the judgment amended to show that the proceedings leading to the judgment occurred in chambers and not in open court, and then sought to have said judgment, after such amendment, vacated, on the grounds, first, that the court had no jurisdiction in chambers, and second, that no notice of the proceeding was given the surety company. (R. 70) That motion was also carried through the State court of last resort.

Baldwin v. American Surety Co., ..... Idaho .....,
..... Pac. (2d) .....

Pac. Rep. Adv. Sheets, ....., 1932.

*And see also:*

Forsyth v. Hammond, 166 U. S. 506.

Had there been shown herein, when an injunction was sought in the Federal courts, some matter of *fact* which showed that these petitioners were not the parties in interest as regarded the respondent's undertaking, and therefore had no right to seek recovery on the contract, this, we submit, would have invoked the rule of the Wiley case, *supra*. But here there were only certain questions of law involved, as to the State courts' view of the proper construction of a contract, and hence the surety's liability or non-liability thereunder, which contract was purely a State contract written in accordance with a State statute, to be construed by the State courts under that and the State statutes relating to judgments and appeals. The trial court's judgment could have been no more than erroneous, and right decision is not a test of jurisdiction.

Faltz v. St. Louis, etc. R. Co., 60 Fed. 316;

Fauntleroy v. Lum, *supra;*

Quagon v. Biddle, 5 Fed. (2d) 608;

Flannigan v. Chapman, etc. Co., 144 Fed. 371.

We submit that the Circuit Court erred in reviewing and reversing the State Supreme Court as to the rules of State law announced in its decision, and hence came to an erroneous conclusion that due process had been denied. That conclusion was wholly the result of rules of State law announced by the Circuit Court, in conflict with the State court.

## III.

## WAIVER OF DUE PROCESS

### Assignment of Error VI

If, upon this record and in the light of the authorities hereinbefore submitted, it can be assumed *arguendo* that there was a denial of due process in the first instance, in petitioners' proceeding by motion for judgment on the undertaking, we here make that assumption, for the purpose only of the closing section of this brief.

If due process were denied in the first instance, we believe the record shows plainly that such denial was waived by the

respondent surety company, at least twice and probably three times.

In its original motion attacking the judgment against it, the respondent submitted to the State court *not only the question of jurisdiction,* but the merits of the matter in their very essence. It contended, *first,* that the contract *should be construed as having stayed execution against the Singer Company only,* as not having stayed execution against that company's co-defendant, and submitted in support of that contention the entire records and files in the original action; *second,* that the contract should be *construed as one in which the sole consideration was an appeal by the Singer Company alone; third,* that the judgment was contrary to good conscience and equity because the contract should be held as executed *solely in consideration of an appeal by the Singer Company only,* and as staying execution against that company only, and *that it should be held that the Singer Company was the principal obligor in that contract,* and that this respondent was thereunder a secondary obligor merely. (R. 37-38)

That motion further sought the court's order *staying all proceedings upon execution, which proceedings were then under way.* Execution had issued, the sheriff had made a levy, and due notice of forthcoming sale had been given. (R. 38-41, 140-143)

While a special appearance, limited to challenging the jurisdiction only, is permitted in Idaho, *(Pingree v. Webb Co.,* 36 Idaho 442; *Pittenger v. Al G. Barnes Circus,* 39 Idaho 807) this respondent did not even profess to make such special appearance by the motion above referred to. It raised substantially every question involved in a consideration of the merits. In response thereto, the State Supreme Court decided a number of the questions raised, and even partly construed the whole contract, to the point of holding that it presented a legitimate question of liability, *for judicial determination.* We think it obvious that an appearance and a pleading in any proceeding *which invokes the jurisdiction and power of the court* in the matter of ordering execution proceedings to cease, is a general appearance. In an almost identical situation, in which it was sought to vacate a judgment and set aside execution proceedings, the Supreme Court of Idaho said:

"While he purported to appear specially, yet he sought to have the court pass upon non-jurisdictional as well as jurisdictional grounds. The object and only office of a special appearance is the presentation of a purely jurisdictional objection, and, as was held in the case of Burnham v. Lewis, 65 Kan. 481, 70 Pac. 377: 'An appearance in an action by a defendant for any purposes other than to contest the jurisdiction of the court will give the court general jurisdiction over such person for all purposes of litigation.'

"In Nelson v. Nebraska Loan & Trust Co., 62 Neb. 549, 87 N. W. 320, the court said: 'Whatever may have been the situation as to want of jurisdiction over the person of the plaintiff in error prior to the time he obtained leave to be made a party defendant and enter objections to the confirmation of sale, he thereby made a general appearance, and the court acquired jurisdiction over him for all purposes of the case. He has invoked the power of the court regarding other matters than that of challenging its jurisdiction over him, has made a general appearance, and waived all objections as to the manner in which he was brought into court.'

"When appellant appeared and moved that the sale under execution be set aside by reason of inadequacy of the sum paid for the property sold, he sought relief which could be granted only upon the hypothesis that the court had jurisdiction of the cause. The appearance was, therefore, a general appearance and gave the court jurisdiction over him for all purposes of the case."

Elliott & Healy v. Wirth, 34 Idaho 805, 806.

It should, we think, be especially noted that in the above case the appearance was made after judgment, just as in the case at bar.

In *Western L. Indemnity Co. v. Rupp*, 235 U. S. 261, this Court said:

"That a State, without violence to the 'due process' clause of the Fourteenth Amendment, may declare that one who voluntarily enters one of its courts to contest any question there pending shall be deemed to have submitted himself to the jurisdiction of the court for all

purposes of the action **** is settled by the decision of this court in York v. Texas, 137 U. S. 15; 34 L. Ed. 604; 11 Sup. Ct. Rep. 9; followed in Kauffman v. Wooters, 138 U. S. 285; 34 L. Ed. 962; Sup. Ct. Rep. 298."

We submit that, under the rule in Idaho, above quoted, the respondent waived any lack of due process, if any there were, by its appearance after judgment and its first motion, above summarized. Further, it appeared again and appealed from the judgment to the State Supreme Court. At practically the same time, it appeared and presented its motion to amend, and then vacate, the judgment against it. The appeal from the judgment was patently an attempt to open up every question on the merits. In the second motion, to amend the judgment, which as hereinbefore shown was also carried through the Court of last resort, we think it plain that any lack of due process was definitely waived. The respondent here contends that the judgment against it was void because of lack of notice at the time of the proceeding for such judgment. A void judgment is a nullity. It is legally non-existent. We contend that a litigant cannot be heard to say in one forum that a judgment against him is a void thing, and therefore legally non-existent, and to contend at the same time in a different forum, as was done here, that such judgment is subject to amendment by the trial court which entered it. A void judgment is not subject to amendment.

Elec. Boat Co. v. Howey, 89 N. Y. S. 210;
Schoellkopf v. Ohmeis, 32 N. Y. S. 736.

In addition to the foregoing, it is a general and well recognized rule that any appearance other than a special appearance strictly limited to the issue of the court's jurisdiction, is a general appearance and confers jurisdiction on the court for all purposes of the proceeding.

A demurrer setting up lack of jurisdiction and also that the complaint does not state facts sufficient to constitute a cause of action, waives any lack of jurisdiction.

St. Louis, etc. R. Co. v. McBride, 141 U. S. 127;
Nelson v. Huested, 182 Fed. 921.

A party cannot, at the same time, be both in and out of court. He cannot dispute the jurisdiction over his

person and at the same time dispute the merits of the matter.

Crawford v. Foster, 84 Fed. 939, 941.

An appearance for any purpose whatever other than the single, limited objection that the court has no jurisdiction *over the person,* is a general appearance.

Wabash Western Ry. Co. v. Brow, 65 Fed. 941, 949.

The last cited decision is of great interest and of greater weight, we believe, in that it was written by the late Chief Justice Taft, then of the Sixth Court of Appeals. It should be noted, we suggest, that a special appearance must be limited to the question of jurisdiction over the person.

The objection of no jurisdiction over the subject matter, in addition to the objection of no jurisdiction over the person, is a general appearance and waives lack of service of process or notice.

Mahr v. Union Pac. R. Co., 140 Fed. 92.

Here, respondent went far beyond the mere question of jurisdiction over the person.

It makes no difference that such an appearance is made after the entry of judgment. An appearance after judgment for any purpose other than to object to the jurisdiction is a general appearance.

Elliott & Healy v. Wirth, 35 Idaho 805, 806, *supra;*
Crane, et al. v. Penny, et al., 2 Fed. 187.

An appeal from a judgment of a trial court to a court of review is a submission to the jurisdiction, and whatever doubt may have existed as to the validity of the former judgment is removed by the judgment of the court of review.

Lawrence v. Nelson, 143 U. S. 215;
Benker v. Meyer, 154 Fed. 290, 295.

Any lack of process is waived

"when without the service of process a defendant in some manner indicates his intention to submit his person and cause to the jurisdiction of the court."

York v. State, 73 Tex. 651. Affirmed in York v. Texas, 137 U. S. 15.

We believe the rule is almost, if not quite, universal that a general appearance after judgment is a waiver of all objection to the jurisdiction or lack of process. In any event, we think there can be no doubt that, under the rule heretofore announced in Idaho and above cited, this respondent went far beyond the confines of a special appearance to question the jurisdiction only, and so appeared generally. If so, it should not now be heard to assert that any objection on the score of the Fourteenth Amendment is still open to it.

*And see:*

Pittenger v. Al G. Barnes Circus, *supra*, 39 Idaho 807, 811-812.

The record now before this court was submitted to the Court of Appeals. It there disclosed that the judgment against this respondent on its contract was entered June 23, 1930. (R. 27) Its first attack thereon, by motion to declare it void, was finally denied by the Idaho Supreme Court on May 2, 1931, remitted to the trial court June 3, 1931. (R. 56, 65) On June 18, following, this respondent filed its motion to amend the judgment against it, supporting it by a lengthy showing of fact. (R. 69-91)

While this last proceeding was pending in the State trial court, a bill of complaint was filed herein in the United States District Court. (R. 1, 132-133) While the case at bar was pending in the Federal District Court, the State trial court overruled respondent's motion to amend the judgment, and thereupon respondent appealed from that order, and took another appeal from the judgment itself. (R. 122, 126, 192) That is to say, the Federal District Court heard the matter on July 28, and the last of the various proceedings in State court just referred to, occurred on July 15th. Practically the entire record of all proceedings in State court up to that time was submitted to the Federal District Court. That court, speaking through Judge Cavanah, denied respondent's motion for a temporary injunction, struck certain irrelevant portions of the bill and sustained a motion to dismiss the bill. (R. 192-193) Later, upon respondent's refusal to amend

the bill or otherwise to plead further, a final decree was entered against this respondent. (R. 194)

We submit that the decree of the Federal District Court should be affirmed herein. We believe the authorities noted in Section I of this brief demonstrate that the only question here involved is one of due process. We believe the Circuit Court of Appeals was limited to the same question and was required, as a matter of law, to accept the rules of State law announced by the Supreme Court of Idaho in its decision against the surety company. We believe that the only question properly before the Circuit Court was whether, under the rules of state announced by the Supreme Court of Idaho, due process had been denied this respondent.

## CONCLUSION

We submit, first, that there was no denial of due process, and second, that in any event there is not, and was not at the time the bill of complaint herein was filed, any question of due process open to this respondent, because of its several general appearances in the State court prior to commencing this action, and the resulting waivers of lack of jurisdiction in the State court, if any, theretofore existing. If either conclusion in the matter of due process is correct, then the Court of Appeals has failed to give full faith and credit to the judgment of the State courts and its judgment and order herein should be reversed. We further submit that the final decree of the Federal District Court should be affirmed.

Respectfully submitted,

JAMES F. AILSHIE, JR.,
J. R. SMEAD,
*Counsel for Petitioners.*

## APPENDIX A

**Section 7155 (4810). Same: Supersedeas: Money Judgment.** If the appeal be made from a judgment or order directing the payment of money, it does not stay the execution of the judgment or order, unless a written undertaking be executed on the part of the appellant, by two or more sureties, to the effect that they are bound in double the amount named in the judgment or order, that if the judgment or order appealed from, or any part thereof, be affirmed or the appeal be dismissed, the appellant will pay the amount directed to be paid by the judgment or order, or the part of such amount as to which the judgment or order is affirmed, if affirmed only in part and all damages and costs which may be awarded against the appellant upon the appeal, and that if the appellant does not make such payment within 30 days after the filing of the remittitur from the supreme court in the court from which the appeal is taken, judgment may be entered, on motion of the respondent in his favor, against the sureties, for such amount, together with the interest that may be due thereon, and the damages and costs which may be awarded against the appellant upon the appeal. If the judgment or order appealed from be for a greater amount than $2000, and the sureties do not state in their affidavits of justification accompanying the undertaking, that they are each worth the sum specified in the undertaking, the stipulation may be that the judgment to be entered against the sureties shall be for such amounts only as, in their affidavits, they may state they are severally worth, and the judgment may be entered against the sureties by the court from which the appeal is taken pursuant to the stipulations herein designated. When the judgment or order appealed from is made payable in a specified kind of money or currency, the judgment entered against the sureties upon the undertaking must be made payable in the same kind of money or currency.

## APPENDIX B

**Section 6693 (4178). When objections deemed waived.** If no objection be taken, either by demurrer or answer, the defendant must be deemed to have waived the same excepting only the objection to the jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action.

## APPENDIX C

**Section 7151 (4802). Who may appeal: Designation of parties.** Any party aggrieved may appeal in the cases prescribed in this code. The party appealing is known as the appellant, and the adverse party as the respondent.

**Section 7152. Time for taking appeals.** An appeal may be taken to the supreme court from a district court:

1. *From a final judgment in an action or special proceeding commenced in the court in which the same is rendered;* from a judgment rendered on an appeal from an inferior court; from a judgment rendered on an appeal from an order, decision or action of a board of county commissioners; within 90 days after the entry of such judgment. (Italics ours.)

2. From an order granting or refusing a new trial; from an order granting or dissolving an injunction; from an order refusing to grant or dissolve an injunction; from an order dissolving or refusing to dissolve an attachment; from an order granting or refusing to grant a change of place of trial; fro many special order made after final judgment; and from an interloctutory judgment in action for partition of real property; within 60 days after the order or interlocutory judgment is made and entered on the minutes of the court, or filed with the clerk.

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IN THE

# SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1932**

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## No. 3

AMERICAN SURETY CO., PETITIONER,

*vs.*

VIVIAN F. BALDWIN ET AL.

---

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO.

---

## No. 21

VIVIAN F. BALDWIN ET AL., PETITIONERS,

*vs.*

AMERICAN SURETY CO.

---

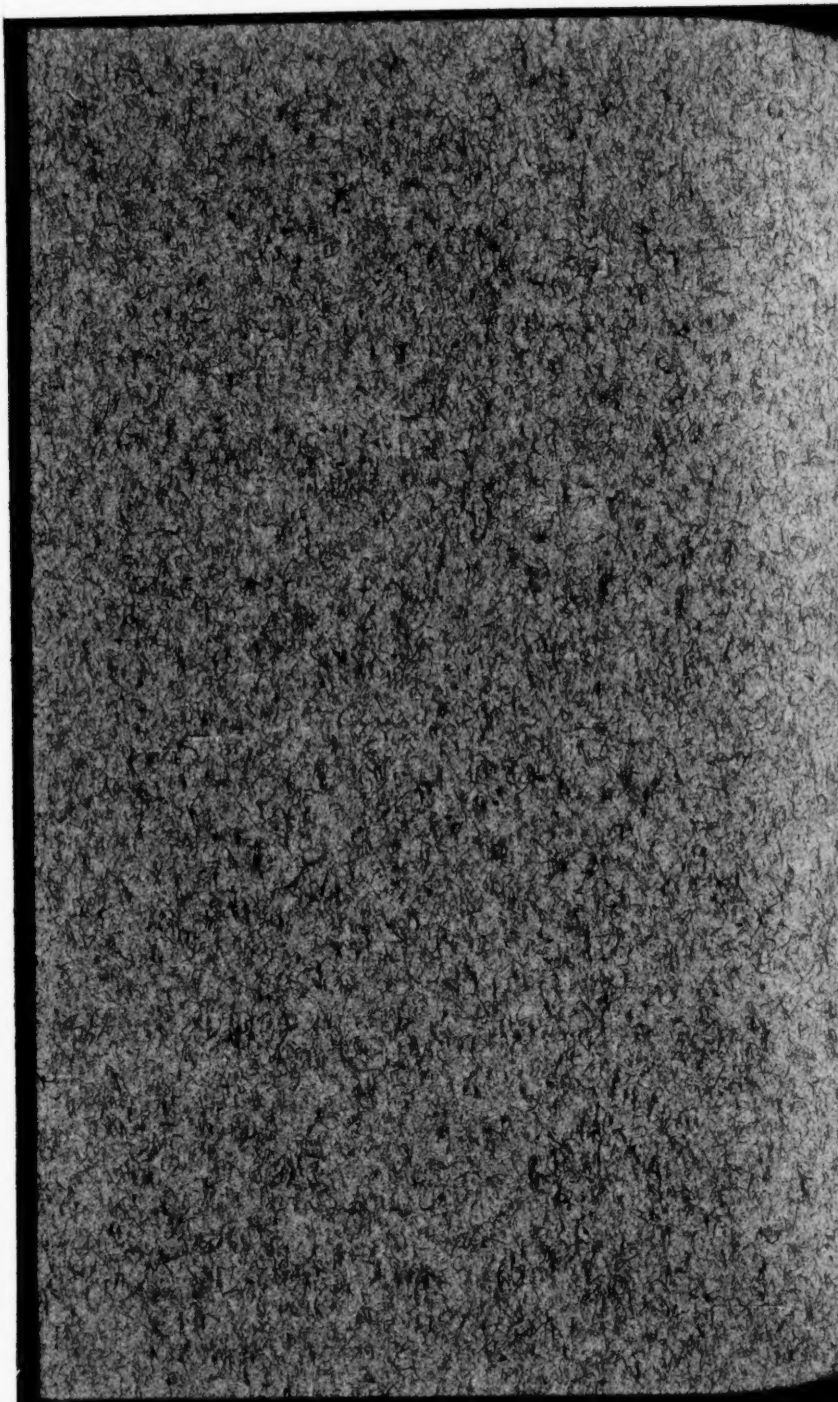
ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

---

## REPLY BRIEF OF VIVIAN F. BALDWIN ET AL.

---

JAMES F. AILSHIE, JR.,
J. R. SMEAD,
*Counsel for Vivian F. Baldwin et al.*



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The brief for American Surety Company was not served upon us until October 8th and as a result, by

reason of the date of hearing, it will be impossible to more than briefly, and perhaps somewhat superficially, review the same.

The Surety Company's brief has been prepared by Eastern counsel who did not participate in any of the proceedings herein until the application for extension of time in which to file their petition for writ of certiorari was made to Mr. Justice Brandeis August 27, 1931 (No. 3, R. 119), which perhaps explains certain erroneous statements of fact contained in the brief for the American Surety Company.*

While we do not believe the inferences and innuendoes directed by counsel for the Surety Company at the Baldwins and their counsel have any (direct or indirect) bearing upon the questions of law before this Honorable Court, we nevertheless beg indulgence in correcting certain patent errors submitted by the Surety Company, to the end that the court may have a fair presentation of the cause.

Upon page 2 of their brief, counsel say:

> "On May 31, 1928, an Idaho court rendered judgment in favor of the Baldwins (for $19,500 damages and $73.70 costs for an automobile collision) against the Singer Company and Ed Anderson (R. 2); from 'the whole' of which judgment they both appealed (R. 3, 12, 13)."

The facts being that *no costs were taxed* (No. 21, R. 33) and although counsel use the term "both ap-

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*Also in the Surety Company's petition for certiorari and in its brief in opposition to the petition for certiorari of Vivian F. Baldwin et al.

pealed", the record shows that the defendants, Singer Company and Ed Anderson, appealed jointly (not jointly and severally) as disclosed by the notice of appeal, a portion of which is quoted as follows:

> "You and each of you will please take notice, that the defendants, Singer Sewing Machine Company, a corporation, and Ed Anderson, hereby appeal to the Supreme Court of the State of Idaho, from that certain judgment entered in the above-entitled action on the 31st day of May, 1928, * * *."

The question of costs is mentioned for the reason that the undertaking under consideration prepared by the Surety Company (No. 21, R. 19) erroneously refers to the judgment as being in the sum of $19,573.70 and which we refer to solely because it demonstrates one of the many inaccuracies contained not only in the Surety Company's brief but in the supersedeas under consideration.

Upon page 4 of their brief, counsel say "This left the Baldwins with nothing but a worthless judgment for $19,500 against the insolvent Ed Anderson". There is nothing whatever in the record by way of affidavit, unsatisfied execution, or otherwise, supporting or tending to support this statement, the fact being as the record demonstrates, that the Baldwins accepted the supersedeas in good faith and *have never, at any time since signing the acceptance of said bond, the 29th day of August,* 1928, *issued execution or otherwise endeavored to collect the judgment until after its partial affirmance by the Supreme Court of Idaho.*

At the bottom of page 4, counsel further say, after referring to certain portions of the bond into which have been inserted the words "Singer Company" in parenthesis:

> "That did not mean that the Singer Company thereby agreed to pay the judgment against *Anderson*, but only the judgment against *itself*. The Surety Company's obligation was only to pay what its principal, Singer Company, was obliged to pay."

This statement of counsel and the portion immediately preceding, demonstrates, we believe, first, that even the Surety Company must write into the bond (by use of the words "Singer Company"), that which does not appear in the original bond as filed and passed upon by the Supreme Court of Idaho. Secondly, it loses sight of the fact that *at the time the bond was executed, accepted and filed, there was no separate judgment against Anderson or against the Singer Company but a single, indivisible, joint judgment against both.* Thirdly, the contention that the Surety Company's obligation was only to pay what its principal, Singer Company, was obliged to pay, is answered by the decision of the Supreme Court of Idaho when, in passing upon this question, it construed its own State statute and said:

> "It is claimed by respondent that these authorities are not in point because the legal effect of an undertaking is the same as that of a bond in that the party executing the undertaking is simply surety for a principal; that in this case the introductory recitals of the undertaking dis-

close that the principal is the Singer Sewing Machine Company, and that upon the action being dismissed as to it such dismissal was also a dismissal as to the Surety Company. *We cannot accept this view.* The undertaking is a complete independent contract. The obligation of its maker is not collateral or secondary. *Moffat* v. *Greenawalt* (Cal.), 27 Pac. 296" (Emphasis ours).

Lastly, the Baldwins would certainly not be bound by the "decision" of the Surety Company as to its liability, hence the necessity for a *judicial determination,* which in the case at bar, was rendered by the only court under the statutes and constitution of Idaho having jurisdiction to entertain and determine the matter.

Upon page 5, counsel, as elsewhere in their brief, have repeatedly and persistently referred to the *ex parte* judgment. We believe it does not require further citation of authority to distinguish between *summary* judgments which are the result of *inter parte* proceedings and *ex parte* proceedings which are by one party alone, the adverse party not being in court. The authorities, we believe, fully support our contention that the judgment here under consideration was entered upon summary proceedings and was *not* an *ex parte* judgment.

Commencing upon page 6, under the heading of "Events of June 3, 1930," several pages are devoted to a (rather severe) criticism of Mr. Ailshie's handling of the proceedings, leading up to the entry of judgment. Referring to the record, page 180 (No. 21), it will be noted that in response to an affidavit of Mc-

Keen F. Morrow which stated that Mr. Ailshie had said to the affiant that he waited until J. F. Martin left the court room, which affidavit was wholly erroneous, Mr. Ailshie made affidavit to the effect that said J. F. Martin was presenting a matter to the court at the time he entered the court room, that necessarily Mr. Ailshie waited until Mr. Martin was through and then stepped to the bench, not (to quote counsel for the Surety Company) "unobtrusively if not secretly" but openly and in the ordinary course of court proceedings, for the reason, as stated in the certificate of Judge Koelsch (No. 21, R. 106) that Mr. Ailshie was not only moving for judgment but was also submitting "a form of judgment, together with the complete records and files in said cause including the opinion of the Supreme Court of the State of Idaho * * *."

In passing, we cannot but comment upon the apparent unfairness of referring to counsel's action as "certainly unobtrusively if not secretly" stepping to the bench, when it was physically impossible to submit the form of judgment, together with the records and files to the court without stepping to the bench for the purpose of handing the same to the trial judge.

The last note on page 7 opens with the statement:

> "Mr. Ailshie overlooked the obvious fact that the Singer Company, Mr. Martin's client, would be liable over as indemnitor of its surety or by subrogation * * *."

Here again counsel pursue the theory of principal and surety rather than the rule of primary obligation, adopted not only by Idaho but also by the many states

and decisions referred to and cited upon page 12 of the brief of the petitioners, Baldwin (No. 21). In this connection it is significant that at no time or place in the many and varied proceedings had in the course of this litigation, or in the long records and voluminous briefs before this Court, has the *Singer Sewing Machine Company ever contended that it secured the execution of the bond in question.* While counsel for the Surety Company have gone far afield in their statement of facts, such action properly gives us no right to discuss matters dehors the record; however it is a matter of common knowledge that operating corporations almost universally carry public liability insurance covering themselves and their employees, for negligence resulting in personal injury. With this in mind, it is not difficult to reason why the Singer Sewing Machine Company has seen fit to remain silent as to whether or not *it* obtained the bond in question.

With further reference to the term "smiled inwardly" as part of an affidavit made by Mr. Ailshie, appearing upon pages 180 to 183 of the record (No. 21), in which it is stated that in the course of a "casual conversation" with Mr. Morrow the statement contained in counsel's brief was made, which statement was part of an informal conversation resulting from certain personal matters with which we will not burden this Honorable Court, for it conclusively appears both from the certificate and affidavit of the trial judge and the affidavit of counsel that neither the court or

counsel knew whether Mr. Martin was present when the motion was made or attached any importance to it. To dwell upon and point out the many of the additional inaccuracies would serve only to unnecessarily extend this reply and thereby greatly impose upon the Court, and we shall therefore confine our discussion to only a few of the more glaring matters.

At the bottom of page 9, counsel after referring to the entry of judgment on June 23, 1930, said "the next morning, June 24, 1930," Mr. Ailshie gave notice to the Surety Company of the entry of judgment. On page 98 of the record (No. 21) it appears (and is nowhere disputed) that at the time motion was made for judgment all of the records and files of the court were submitted to Judge Koelsch, together with certain citations, one being 22 Fed. (2d 369, and *Wood* v. *Orford*, 56 Calif. 157, and it further appears without contradiction, on page 182 of the record (No. 21), that immediately after the entry of judgment on June 23d and on the same day Mr. Ailshie went to the office of Messrs. Richards & Haga who had signed the supersedeas on behalf of the American Surety Company and advised them that a judgment had been entered and an execution had been issued and then and at that time delivered a copy of the judgment to Mr. McKeen F. Morrow of said firm and at his request furnished him with a copy of the undertaking. In this connection we call attention to the opinion of Judge McNaughton of the Supreme Court of Idaho (21, R. 56), where it is said:

> "We think, regardless of what our construction of the bond might be, it cannot be said ap-

pellants had no right to submit the question, nor can it be said that such submission was a fraud upon the court and upon that ground its judgment was void."

Further, in this connection, we call attention to the memorandum opinion of Judge Cavanah, wherein he says:

"* * * the only remaining question is: Whether the judgment was obtained by fraud, accident or mistake unmixed with any fault or negligence of the plaintiff. The record seems to be silent as to any fact going to show that fraud was perpetrated upon the court in obtaining the rendition of the judgment. The allegation in the bill as to the obtaining of the judgment by fraudulent means is a conclusion and not a statement of fact showing what the fraudulent acts were. A bill for relief on the ground of fraud must be specific, and the facts constituting it must be stated, however the showing presented does not establish any fraud of the conduct of counsel for defendants when he moved in open court the entry of the judgment or thereafter, for it appears that he appeared in open court when the Judge was on the Bench and moved under the statute the entry of the judgment and tendered form of judgment to the Judge who after requiring authorities to be presented took the matter under advisement and thereafter entered the judgment, while there appears a sharp conflict between counsel as to whether the bond only secured the liability of the Sewing Machine Company, whom plaintiff asserts was the only principal in the bond for which it was surety, yet all the facts fall far short in establishing fraudulent con-

> duct of counsel in obtaining the rendition of the judgment" (No. 21, R. 190).

And finally the trial judge, Hon. Chas. F. Koelsch, made affidavit as follows:

> "I further state that no fraud was practiced upon the said District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada, or myself, as one of the judges thereof, in the making of motion for judgment against the American Surety Company of New York, on the 23d day of June, 1930, or in obtaining my order granting the said motion, or in the entry of said judgment" (No. 21, R. 136).

In addition to the foregoing, the record discloses that in the injunction proceedings, in the Federal court the Baldwins moved to strike from the bill of complaint all of the allegations of fraud (21, R. 46), which motion was granted by Federal Judge Cavanah (21, R. 193) and which order *was not disturbed by the Circuit Court of Appeals and as the matter now stands all allegations of fraud contained in the bill are stricken* (No. 21, R. 264).

On page 13, counsel states:

> "On July 6, 1931 (shortly after the Supreme Court of Idaho had reversed Judge Koelsch and reinstated the June 23rd judgment), the Surety Company filed its bill in equity in the Federal Court of Idaho to enjoin the Baldwins from enforcing the *ex parte* judgment * * *."

Prior to that date it will be remembered that the Surety Company had voluntarily submitted to the

jurisdiction of the said trial court (on June 26, 1930), and moved the court to set aside the judgment upon *non-jurisdictional* as well as jurisdictional grounds and on the date of filing the bill the Surety Company also had pending in the State court a motion to amend, correct and vacate the judgment of June 23rd, which appeal was taken in July. The motion for temporary injunction together with the motions of the Baldwins addressed to the bill were heard in Federal Court, July 28, 1931, at which time the Surety Company had pending in the State Supreme Court the following:

An appeal from an order denying it's motion to amend, correct and vacate the judgment,
(and)
A direct appeal from the judgment.

Thereafter application was made by the Surety Company to Mr. Justice Brandeis, on August 27th for an order extending time to October 1, 1931, in which to file a petition for writ of certiorari to the Supreme Court of Idaho, which was not served on the Baldwins or their counsel and of which they had no knowledge until November 6, 1931, when the petition and record were served. (Records of the Clerk, U. S. Sup. Ct.)

At the time the application was made to Mr. Justice Brandeis the Surety Company had pending the following:

(1) A direct appeal to the Supreme Court of Idaho taken July 13, 1931, from the judgment of June 23, 1930 (No. 21, R. 122).

(2) An appeal to the Supreme Court of Idaho taken July 14, 1931, from an order denying it's

motion to correct, amend and vacate (No. 21, R. 26).

(3) An appeal to the U. S. Circuit Court of Appeals for the Ninth Circuit taken Aug. 5, 1931, from Judge Cavanah's decree denying the temporary injunction and dismissing the bill (No. 21, R. 202-207).

(4) An injunction issued out of the U. S. Circuit Court of Appeals for the Ninth Circuit, on the 14th day of August, 1931, enjoining the Baldwins and their agents from collecting the judgment of June 23rd (No. 21, R. 241).

In this connection we again call attention to *Baldwin v. Iowa Travelling Men's Association* (283 U. S., 522) cited at pages 19 and 26 of our brief (No. 21), for we believe the record before this Honorable court discloses a state of facts in direct conflict with the rule therein announced.

Turning to page 18, counsel stated as follows:

> "From the instrument itself"—to use the canon of interpretation laid down by the Supreme Court of Idaho to determine the obligations of the "undertaking" (R. 51)—one would never dream that there was a $19,573.70 judgment against *Anderson;* but only that there was such a judgment against the *Singer Co.*

This paragraph, we believe, answers itself. If, as counsel contends, the supersedeas is so ambiguous and unintelligible that "from the instrument itself one would never dream there was a judgment against Anderson but only a judgment against the "Singer Company" then certainly such a statement is a tactit ad-

mission that some judicial determination of the liability created by the bond must be had. That being the case, under Section 7155 Idaho Compiled Statutes, the District Court of the Third Judicial Court of the State of Idaho in and for the County of Ada, that being the court in which the bond was filed (it being an Idaho contract and being a court of original jurisdiction under the Constitution of Idaho, Article V, Section 20).*

and the supersedeas itself providing as it does, that judgment might be entered upon motion, we submit that the trial court which entered the judgment was the only court, under the constitution and laws of Idaho having jurisdiction to pass upon the Surety Company's liability.

In this connection, we call attention to the fact that the Statute, Section 7155, as well as the bond itself, provides that if payment is not made "within 30 days" after the filing of remittur judgment may be entered. No reference is made to notice, for the Idaho statutes provide that where notice is required, five days shall be allowed.

From this we believe that if the trial court which entered the judgment did not have jurisdiction then the mere giving of notice could confer no greater rights or powers upon the court than the bond itself in which

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*Idaho Constitution, Article V, Section 20: "Jurisdiction of District Court. The District Court shall have original jurisdiction in all cases, both at law and in equity and such appellate jurisdiction as may be conferred by law."

event the Baldwins would be denied their day in court and their right to litigate the liability of the Surety Company despite the express obligation of the bond that if the said judgment (which at the time of the filing of the bond was joint and not joint and several) or any part thereof be affirmed the Surety Company would pay.

At this point we cannot avoid inquiring of counsel what part of the judgment was subject to execution when the notice of appeal recites that "the defendants * * * hereby appeal * * * from that certain judgment and from *the whole thereof*", and the *supersedeas recites that its purpose is the "staying* the execution of said judgment *so appealed from* "and thereafter recites that if the said judgment appealed from *or any part thereof be affirmed* * * *"' the the judgment will be paid. The whole judgment, we submit, includes each and every part.

Turning to page 29 of the Surety Company's brief, counsel have, we believe, through their own argument, run squarely counter to the long line of decisions of this Honorable Court, cited at pages 8 to 18 of the brief of petitioners (No. 21) when they say:

> "But the Surety Co.'s 'understaking' did not give to the Idaho courts jurisdiction over the Surety Co.'s person to render an ex parte judgment conclusive and beyond attack, if it should ultimately be held that the Idaho courts' ex parte construction of the 'undertaking' was erroneous."

In other words, counsel apparently concede that at most the Surety Company's only contention is

that the trial court committed *error* in the entry of judgment which the Supreme Court of Idaho has held could be corrected if actually existing only upon appeal, and from which it follows that the question of jurisdiction upon which the Surety Company's only claim of denial of process is predicated, must necessarily fall by the wayside.

This paragraph we believe, fully answers the Circuit Court of Appeals inasmuch as the Surety Company in the final analysis complains only of error, which this Court has repeatedly held lower courts might not review. See *Lyon Bonding Company* v. *Karatz* (262 U. S. 77), where it is stated that; "Lower Federal courts are not superior to State courts."

In closing we cannot forego calling attention to page 31 wherein counsel refer to the "*State Court's queer decision on procedure*", and thereafter say "*even if the Surety Company had appealed, no one knows what the Idaho court would have done and the record on such appeal would have been a purely ex parte record, cleverly contrived by Mr. Ailshie in the absence of the Surety Company to support if possible the judgment he had obtained.*"

It is indeed remarkable that a litigant should seek to excuse his failure to appeal because, "no one knows what the Idaho court would have done * * *."

The foregoing statement of counsel is equally remarkable when it is recalled that the Surety Company lays great stress upon the dissenting opinion of Judge Budge and in the same breath, complain of the ex parte record on appeal, whereas Judge Budge uses the following language:

"In the majority opinion it is held that the lower court had jurisdiction to enter the judgment upon the supersedeas bond and that its action in this regard is not subject to be reviewed by notice and motion, but on appeal. This position to my mind is not tenable. This Court has now before it the *identical record it would have,* had an appeal been taken."

**No Federal Question Raised by American Surety Company.**

The records of this Court disclose that following the filing of the Surety Company's petition for writ of certiorari to the Supreme Court of Idaho (No. 3, October term, 1932, No. 494, October term, 1931), The Baldwins moved to dismiss the petition upon two grounds, Point No. 1 of which was based upon the fact that the decision of the Supreme Court of Idaho was not a final determination, by reason of the Surety Company's pending appeals in the Supreme Court of Idaho; Point No. 2 being as follows:

II.

That no Federal question is involved or properly raised in this Honorable Court as is disclosed by the following portions of the record:

(*a*) The original motion of the surety company (R. 22-24) discloses that no Federal question or claim of denial of due process of law was raised in the trial court.

(*b*) The opinion of the Supreme Court of Idaho (R. 46-54) discloses that no Federal ques-

tion was presented to the Supreme Court of Idaho.

(*c*) No attempt was made to raise any Federal question in any manner until after the decision of the Supreme Court of Idaho, May 2, 1931, when it was raised for the first time by petition for rehearing (R. 68). (Record citations are to No. 3.)

In view of the fact that the records do not disclose a specific denial of this motion, we most respectfully call attention to the fact that the Surety Company chose as its forum the State Court in which to litigate the question of jurisdiction and not until more than one year after the entry of judgment did it file its bill in Federal Court, seeking to enjoin the collection of the judgment and asserting the protection of the "due process" clause of the Federal Constitution.

DUE PROCESS NOT RAISED IN STATE TRIAL OR SUPREME COURTS UNTIL PETITION FOR REHEARING.

Of the greatest significance, we believe, is the fact that the American Surety Company, after selecting the forum in which it chose to litigate the question of jurisdiction, in its motion to declare the judgment void, which is the only matter before this Honorable Court in case No. 3 (No. 3, R. 22), made no assignment or suggestion that its Federal Constitutional rights had been violated by the entry of the judgment of June 23d and *no Federal question is mentioned in that motion or was ever asserted, argued or discussed*

*by the Surety Company in the State Trial Court or in the Supreme Court of Idaho until after the decision of the Supreme Court of Idaho when the suggestion was first made in the dissenting opinion of Judge Budge and was thereafter raised for the first time by the Surety Company in its petition for rehearing* (No. 3, R. 72).

In addition to the record and as proof of the correctness of the foregoing statement, we call attention to page 6 of the petition of the American Surety Company for writ of certiorari, October term, 1931, No. 494, where it is said:

> "Upon the rendition of the decision of the Idaho Supreme Court, Petitioner promptly moved for rehearing and raised the Constitutional question,"

and thereafter counsel cites *Missouri ex rel. v. Gehner*, 281 U. S. 313, wherein it is stated:

> "It is well settled that this court will not consider questions that were not properly presented for decision in the highest court of the State. Ordinarily, it will not consider contentions first made in a petition to the State Court for a rehearing where the petition is denied without more."*

For their failure to sooner raise the question, counsel, upon page 7 of the petition, say:

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*The Surety Company's petition for rehearing was denied by the Supreme Court by formal order without comment, and without dissent on the part of any Justice (No. 3, R. 117).

> "Petitioner was not bound to anticipate in advance of the decision of the Supreme Court of Idaho that it would declare the hitherto unheard of doctrine that the mere execution of a supersedeas bond for the Singer Company, (even if it presented the question whether the Surety Company became surety for Anderson), amounted to a consent that such question be determined *ex parte* and prevented the Surety Company from attacking the *ex parte* judgment as void for lack of jurisdiction."

This statement seems to us to be so inconsistent with the position now taken by the Surety Company and so absolutely out of harmony with the holdings of the Supreme Court of Idaho that we call attention to two matters we believe to be of grave importance: First, at the time it selected its forum and determined to litigate the question of jurisdiction the Surety Company had knowledge of the actual existence of the judgment of June 23d, and the Surety Company should not be heard to say that it was not bound to anticipate the decision which actually existed. Therefore, in litigating the issue of jurisdiction it was encumbent upon the Surety Company to litigate and present every reason upon which it decided to rely in having the judgment declared void.

We submit that this matter falls squarely within the rule of *Citizens Nat'l Bank* v. *Durr*, 257 U. S. 99, 106. This is not an instance of a decision which could not have been anticipated. The very question at issue was the jurisdiction of the lower state court. This petitioner, by asserting that the judgment was void, itself was the author of that question. Surely, a liti-

gant should be bound to anticipate an adverse decision as well as one favorable to him; and surely, it is his duty, where he himself takes the initiative, as here, to present in support of his own proposition those matters of law, whether constitutional or statutory, upon which he expects to rely.

Second, the suggestion that the Surety Company was not bound to anticipate a decision to the effect that mere execution of a supersedeas amounting to a consent that the question be determined *ex parte* prevented the Surety Company from attacking the judgment as void for lack of jurisdiction, has no foundation in the record, for the opinion of the Idaho Supreme Court discloses upon its face that the court did not hold that the Surety Company was *prevented* from attacking the judgment as void, but merely held that the trial court erred in holding that the judgment of June 23rd was actually void. In other words, the Surety Company *had the right to litigate the issue of jurisdiction* through the medium of its motion to vacate and annul and the Supreme Court simply held that the Surety Company was wrong in its contention and that the trial court erred in following that contention. In this connection we believe that a comparison of the decision of Judge Wilbur, who wrote the opinion of the Circuit Court of Appeals, dated January 18, 1932, and the opinion of Judge McNauton, the writer of the opinion of the Supreme Court of Idaho dated May 2, 1931, will fully answer counsel's argument and will also disclose the error of the Circuit Court of Appeals of which we complain. For convenience, we set out the pertinent portions of the two opinions, side by side:

Opinion of Judge Wilbur, January 18, 1932.

"This decision was based on the proposition that the trial court had no jurisdiction to set aside its judgment under the circumstances and that the remedy of the surety company was by an appeal from the judgment." (No. 21, R.252.)

"When it applied to the State district court to have the judgment vacated, it might have been bound by an adverse decision of that court if one had been rendered were it not for the fact, *as subsequently determined by the Supreme Court of the State, that the District Court of the State had no jurisdiction to consider the question at all;* that the Supreme Court of Idaho alone had jurisdiction to correct the error on appeal." (No. 21, R. 263.)

Opinion of Idaho Supreme Court, May 2, 1931.

"We find the trial court, upon the motion for judgment on the bond, had jurisdiction of the parties and jurisdiction of the subject-matter; that an issue was presented and it had jurisdiction to construe the undertaking and decide the issue which its judgment assumes to decide. It follows the judgment was not void, even if erroneous in the construction, and that *the trial court committed error in anulling and vacating it as void.*" (No. 21, R. 56.)

In the foregoing opinions it will be noted that even Judge Wilbur refers to the correction of *error*, which, as we have heretofore said, is in the final analysis the gist of the contention made by the Surety Company. However, the Surety Company when it filed its motion to vacate and annul the judgment, did not claim *mere error* but asserted that the judgment was absolutely void and this Honorable Court is now asked in the face of this record to hold that the Surety Company's claim of *error* amounts to a denial of *due process of law.*

## Conclusion.

The Surety Company assumes without argument or citation of authority that it was in no wise liable on the supersedeas. The authorities, however, illustrate the fact that there was a serious and substantial ques-

tion presented to the Trial Court for construction of the contract, as disclosed by the following:

In 2, Ruling Case Law, page 312, it is said:

> "On general principles it is obvious that if the entire judgment of the lower court is reversed, no action will lie on the bond; but the judgment may be affirmed in part and reversed as to part, and the question then arises as to whether there has been an affirmance. If the provision is to pay the judgment if affirmed in whole or in part there can be no question as to the liability on the bond if the judgment is affirmed in part. And if there are several defendants and the judgment against them is reversed as to some and affirmed as to others, the prevailing doctrine is that the sureties are liable on the bond."

A case most nearly in point, in which the contention which the surety company now presents was held to be without merit, is *Thomas* v. *Lee et al.*, 74 Wash. 286. In that case plaintiff obtained a joint judgment against D. H. Lee, G. W. Lee and Anna Lee. The notice of appeal was given by all of the defendants but the bond was signed only by D. H. Lee and G. W. Lee as principals. The bond, however, recited:

> "that, whereas, the above-named A. T. Thomas * * * recovered judgment against the above-named defendants, * * * now, therefore, if the above-named principals, D. H. and G. W. Lee, shall pay to A .T. Thomas * * * all costs and damages * * * not exceeding the sum of $200, and shall satisfy and perform the judgment or order appealed from in case it

> shall be affirmed, and any judgment or order which the Supreme Court may render or make, * * * then this shall be void * * *."

Motion to dismiss the appeal was made upon the ground that one of the defendants, namely Anna Lee, did not join as a principal in the bond, and that the bond affirmatively showed she was not named in and did not sign as a principal. In considering this question the Supreme Court of Washington said:

> "The bond is conditioned to pay the judgment; the objection therefore, goes to the form rather than to the substance of the undertaking. We think the bond fairly indicates that it is given on behalf of all the appellants, and is within the spirit, if not the letter, of the case of *Fidelity & Deposit Company* v. *Seattle, Renton & Southern R. R. Co.*, 50 Wn. 391, 97 Pac. 453. The only interest respondent can have in the bond is whether a recovery can be had upon it. No objection could be made by the surety under the principle announced in *Yost* v. *Empire State Surety Company*, 69 Wn. 397, 125 Pac. 167. The motion to dismiss the appeal is denied."

We call particular attention to the following statements from that opinion:

> "The bond is conditioned to pay the judgment * * *,"

and:

> "The only interest respondent can have in the bond is whether a recovery can be had upon it."

Following the reasoning of the Supreme Court of Washington, the condition of the bond at bar is that:

> "If the said judgment appealed from, or any part thereof, be affirmed,"

it will be paid, and stronger even than the Washington case is the "staying the execution of said judgment". This case is cited with approval in *Dibert* v. *Peterson et al.*, 83 Wash. 479, wherein a notice of appeal was given by all of the appellants but the supersedeas bond was not signed by one. In passing upon this question it was said:

> "A notice of appeal was given by all of the parties plaintiff. The bond was not signed by Anna Dibert, the wife of Herman Dibert, Caroline Dibert and Herman Dibert. It is in form a supersedeas. No objection was made to the form of the bond in court below.
>
> The motion is denied under the authority of *Thomas* v. *Lee*, 74 Wn. 286, 133 Pac. 446."

*Thomas* v. *Lee, supra,* was again approved in *Rupe* v. *Kemp,* 99 Wash. 371, where it was said:

> "The policy of the law, that one for whose benefit a bond is given shall not be denied because of any technical informality in the bond, has been evidenced by many statutes passed in this state. (Remington Code, Sec. 777, 1413 and 8327) and declared in several decisions of this court. The only interest respondent can have in the matter is to insure a bond upon which a recovery could be had. Neither appellant, nor his surety, could defeat a recovery by a plea of defect in form. The bond is sufficient. *Thomas* v. *Lee* * * *."

In harmony with the foregoing is *Wood* v. *Orford et al.*, 56 Cal. 157. In this case plaintiff obtained a joint judgment against Mary J. Orford and Robert Orford from which defendants jointly appealed resulting in an affirmance as to Mary J. Orford and a reversal as to Robert Orford. Suit was brought on the bond, the pertinent part of which was as follows:

> "That if said judgment appealed from, or any part thereof, be affirmed, or the appeal dismissed, the appellant will pay in gold coin the amount directed to be paid by the judgment or order, or the part of that amount, as to which the same shall be affirmed."

The court will note that in the foregoing clause the singular "appellant" is used. In passing upon this question the Supreme Court of California held that by guaranteeing the payment of all or any part of the judgment as to which an affirmance should be given, the sureties became as much the sureties of Mary Orford as for her husband, and that by staying the execution of the judgment, the stay operated for her as well as for him. The court there said:

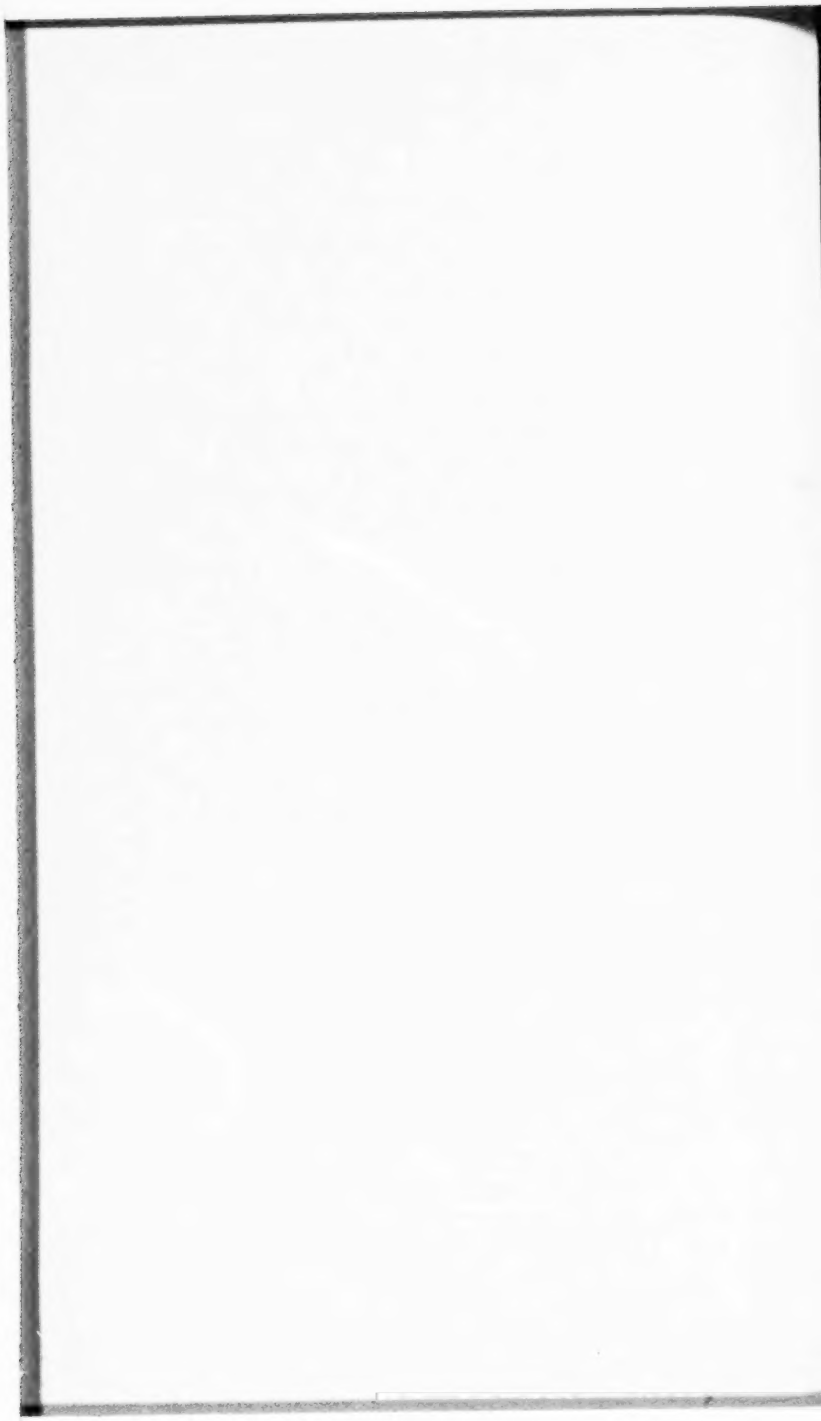
> "We do not think that this point is well taken. Clearly, the judgment was affirmed in part, viz: as to that part which was against Mary J. The defendants Orford and Orford jointly took the appeal; the sureties were as much for Mary J. as for Robert Orford; the undertaking was given to stay execution against her as well as against them. If he alone had appealed and given a bond, execution could have issued as to her; but the sureties undertook, on her behalf,

that if execution be stayed pending the appeal, she should pay whatever of the judgment should be affirmed on the appeal. Judgment affirmed."

WHEREFORE it is prayed that the judgment of the Supreme Court of Idaho be affirmed or that the writ directed to that court be dismissed, and that the judgment of the United States Circuit Court of Appeals for the Ninth Circuit be reversed.

Respectfully submitted,

JAMES F. AILSHIE, JR.,
J. R. SMEAD,
*Counsel for Vivian F. Baldwin, et al.*



Nos. 3 and 21.

FILE
DEC 23 19
CHARLES ELMORE

IN THE

# Supreme Court of the United States,

OCTOBER TERM, 1932.

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**No. 3.**

AMERICAN SURETY CO.,
*Petitioner,*

vs.

VIVIAN F. BALDWIN, *et al.*

*On Writ of Certiorari to the Supreme Court of Idaho.*

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**No. 21.**

VIVIAN F. BALDWIN, *et al.*,
*Petitioners,*

vs.

AMERICAN SURETY CO.

*On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.*

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## PETITION OF AMERICAN SURETY CO. FOR REHEARING.

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**WILLIAM MARSHALL BULLITT,**
**ALLAN C. ROWE,**
*Counsel for American Surety Company.*

The Evening Post Job Printing Office, Inc., 154 Fulton St., New York, N. Y.

Nos. 3 and 21.

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VIVIAN F. BALDWIN, *et al.*,
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vs.

AMERICAN SURETY CO.

*On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.*

## PETITION OF AMERICAN SURETY CO. FOR REHEARING.

The American Surety Company petitions for a modification of the opinion and for rehearing in these cases for the following reasons:

## No. 3.

The opinion delivered November 14, 1932, by Mr. Justice Brandeis says (p. 3):

> "The certiorari granted in No. 3 to review the judgment rendered by the Supreme Court of Idaho on May 2, 1931, must be dismissed *for failure to make seasonably the federal claim.* * * * The Baldwins appealed to the Supreme Court of Idaho, and upon the presentation of their appeal *no federal question was raised* by either party. The Supreme Court on May 2, 1931, reversed the order vacating the judgment. * * * The Surety Company petition for a rehearing. *In that petition* besides reiterating several of its previous contentions, *it urged, for the first time,* that the rendition of the judgment on its undertaking violated the due process clause of the Fourteenth Amendment. The petition was denied without opinion. The federal claim there made cannot serve as a basis for review by this Court."

On May 2, 1931, when the Supreme Court of Idaho delivered its opinion, referred to in the foregoing quotation, one of the Judges, Budge, *J.*, dissented, closing with the following paragraph (R. 63):

> "No other result can follow from the holding of the majority than a miscarriage of justice, and *it is repugnant* to both the State and *Federal Constitutions* in that the Surety Company is deprived of its property without due process of law."

Does not that demonstrate that the Federal question was considered by the Supreme Court of Idaho when one of its Justices dissents on the ground that the majority holding is *repugnant* to the "due process" clause of the *Federal* Constitution?

As this Court's decision dismissing the Certiorari in No. 3 was expressly and solely based upon the Surety Company's failure to seasonably make the Federal claim, it would ap-

pear that this Court was in error in saying that the Federal question had never been presented on the first appeal. It is, of course, conceivable that the Surety Company's counsel did not raise the question on the appeal (the record is silent as to that), and that the dissenting Judge, BUDGE, *J.*, raised the question himself. In any event it is clear that it was *in fact considered* by the Supreme Court of Idaho.

The matter is called to the attention of the Court, in order that it may correct the opinion or alter its conclusion, if it so desires.

## No. 21.

The opinion of Mr. Justice Brandeis says (p. 5):

> "the federal remedy was barred by the proceedings taken in the state court which ripened into a final judgment constituting *res adjudicata*."
>
> "The Surety Company was at liberty to resort to the federal court regardless of citizenship, because entry of the judgment without notice, unless authorized by it, violated the due process clause of the Fourteenth Amendment, * * * And it was at liberty to invoke the federal remedy without first pursuing that provided by state procedure * * *. But an adequate state remedy was available; *and having invoked that and pursued it to final judgment, the Surety Company cannot escape the effect of the adjudication there.*"

While that statement is undoubtedly sound, has not the court possibly overlooked two important facts which renders it inapplicable to the instant case?

**(1) The Surety Company did not invoke and pursue the adequate remedy available in the state court.**

The only remedy available to the Surety Company in the state courts was by way of appeal from the *ex parte* judgment of June 23, 1930.

The Surety Company attempted to pursue a remedy which the Supreme Court of Idaho has held was non-existent. The

Surety Company did not pursue the only available state remedy and there has been no adjudication of the Supreme Court of Idaho thereon.

(2) All that the Supreme Court of Idaho adjudicated was:

(a) that by filing the supersedeas The Idaho District Court acquired jurisdiction over the person of the Surety Company.

(b) that the Idaho District Court had no power to set aside its ex parte judgment of June 23, 1930.

(c) that the sole remedy of the Surety Company was by way of appeal from the ex parte judgment.

These matters are *res adjudicata* between the Surety Company and the Baldwins; and all courts, Federal as well as state, are bound by them.

Granting that the state court had jurisdiction of the parties; that the Surety Company had a remedy in the state court which it had failed to pursue and that it had attempted to pursue a different but not-existent remedy, it is respectfully submitted that it was still *"at liberty to invoke the federal remedy without first pursuing that provided by state procedure"* (Opinion Mr. Justice Brandeis, top of page 6).

It is respectfully submitted that it cannot be said that an *abortive* attempt to pursue a *non-existent* state remedy, is the legal equivalent of invoking an adequate state remedy that may be available.

This court clearly holds that the mere existence of an adequate remedy in the state courts does not prevent the filing of a bill in equity in the Federal courts to enjoin the enforcement of an unconscionable judgment rendered in the state court.

How does the existence of such remedy in the state court bar the filing of the bill in the Federal courts, where the complainant has mistakenly attempted to pursue a different *non-existent* state remedy? After the state courts held that the remedy attempted did not exist, the complainant in the Federal court apparently is in the same position, as far as

the existence of a state remedy is concerned, as if he had never gone into the state courts at all. The state remedy exists, but its existence does not affect the right to Federal relief.

Respectfully submitted,

WILLIAM MARSHALL BULLITT,
ALLAN C. ROWE,
Counsel for American Surety Company.

We hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

WILLIAM MARSHALL BULLITT,
ALLAN C. ROWE,
Counsel for American Surety Company.

# SUPREME COURT OF THE UNITED STATES.

Nos. 3 and 21.—October Term, 1932.

| | | |
|---|---|---|
| 3 | American Surety Co., Petitioner, *vs.* Vivian F. Baldwin, et al. | On Certiorari to the Supreme Court of Idaho. |
| 21 | Vivian F. Baldwin, et al., *vs.* American Surety Co. | On Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit. |

[November 14, 1932.]

Mr. Justice Brandeis delivered the opinion of the Court.

In each of these cases, the American Surety Company of New York seeks to be relieved from a judgment in favor of the Baldwins entered against it by an Idaho court for $22,357.21 and interest, on a supersedeas bond. No. 3, which is here on certiorari to the Supreme Court of Idaho, brings the record of the cause in which that judgment was entered. 286 U. S. 536. No 21 is here on certiorari to the United States Circuit Court of Appeals for the Ninth Circuit, which reversed the decree of the federal court for Idaho denying the Surety Company's application to enjoin the enforcement of the judgment and dismissing the bill. 286 U. S. 537. In each case it is claimed that the judgment is void under the due process clause of the Fourteenth Amendment.

The bond was given upon the appeal of the Singer Sewing Machine Company and Anderson, its employee, to the Supreme Court of Idaho from a judgment for $19,500 recovered against them by the Baldwins in an Idaho district court for an automobile collision. The defendants had given a joint notice of appeal "from that certain judgment . . . against the defendants and each of them, and from the whole thereof." Pursuant to the statutes (Idaho Compiled Statutes, sections 7154 and 7155), two bonds were given by the Surety Company, both being executed only by it. One was in the sum of $300 for costs; the other was the supersedeas bond

in the sum of $25,000 here in question, copied in the margin.[1] It recited that "if the said judgment appealed from, or any part thereof, be affirmed" and "if the said appellant does not make such payment within thirty days from the filing of the remittitur from the Supreme Court in the court from which the appeal is taken, judgment may be entered on motion of the respondents in their favor against the undersigned surety."

---

[1] VIVIAN F. BALDWIN and E. R. BALDWIN, Plaintiffs, *v.* SINGER SEWING MACHINE COMPANY, a Corporation, and ED. ANDERSON, Defendants.

Whereas, the defendant, Singer Sewing Machine Company, a corporation, in the above entitled action has appealed to the Supreme Court of the State of Idaho from the judgment made and entered against it in the above entitled action and in the above entitled court in favor of the plaintiffs in said action on the 31st day of May, 1928, for the sum of Nineteen Thousand Five Hundred ($19,500.00) Dollars and for Seventy-three and 70/100 ($73.70) Dollars costs in said suit, making a total of Nineteen Thousand Five Hundred and Seventy-three and 70/100 ($19,573.70) Dollars, and from the whole of said judgment;

And whereas, the said appellant, Singer Sewing Machine Company, a corporation, is desirous of staying the execution of said judgment so appealed from;

Now, therefore, the undersigned American Surety Company, a corporation authorized to, and doing business in the State of Idaho, in consideration of the premises and of such appeal on the part of said appellant, Singer Sewing Machine Company, a corporation, does hereby acknowledge itself firmly bound in the sum of Twenty-five Thousand ($25,000.00) Dollars, gold coin of the United States, that if the said judgment appealed from, or any part thereof, be affirmed, or the appeal dismissed, the appellant will pay in gold coin of the United States of America, the amount directed to be paid as to which said judgment shall be affirmed, if affirmed only in part, and all damages and costs which may be awarded against the appellant upon the appeal, and that if the said appellant does not make such payment within thirty days from the filing of the remittitur from the Supreme Court in the court from which the appeal is taken, judgment may be entered on motion of the respondents in their favor and against the undersigned surety for the said sum of Nineteen Thousand Five Hundred Seventy-three and 70/100 ($19,573.70) Dollars, together with the interest that may be due thereon and the damages and costs which may be awarded against the said appellant, Singer Sewing Machine Company, upon the appeal.

In Witness Whereof, the said American Surety Company, has caused its name and seal to be attached hereto by its proper officers and agents at Boise, Idaho, this 28th day of August, 1928.

AMERICAN SURETY COMPANY OF NEW YORK,
By HOWARD E. STEIN,
*Attorney-in-Fact.*
Countersigned:
HOWARD E. STEIN,
*Agent at Boise, Idaho.*

The Supreme Court affirmed the judgment as to Anderson and reversed it as to the Singer Company, *Baldwin* v. *Singer Sewing Machine Co. and Anderson*, 49 Idaho 231. Upon the filing of the remittitur the appropriate new judgment against Anderson was entered in the trial court. That judgment having remained unpaid more than thirty days, the Baldwins, without giving notice to either of the original defendants or to the Surety Company, moved the trial court to enter judgment against the latter. On June 23, 1930, judgment was so entered against the Surety Company in the sum of $22,357.21 and interest, with a provision "that the plaintiffs have execution therefor."

The Surety Company concedes that by executing the supersedeas bond it became, by the laws of Idaho, a party to the litigation;[2] and that if the effect of the bond was to stay the judgment as against Anderson, consent had thereby been given to the entry of judgment without notice and the judgment would be unassailable. Compare *Pease* v. *Rathbun-Jones Engineering Co.*, 243 U. S. 273, 279. Its contention is that the bond, properly construed, did not stay the judgment as against Anderson, but solely as against the Singer Company; that hence, the Surety Company had not consented to the entry of a judgment against it upon Anderson's failure to pay; and that since the judgment against it was entered without giving it notice and the opportunity of a hearing on the construction and effect of the bond, the judgment is void under the due process clause of the Fourteenth Amendment.

*First.* The certiorari granted in No. 3 to review the judgment rendered by the Supreme Court of Idaho on May 2, 1931 must be dismissed for failure to make seasonably the federal claim. The

[2]The Idaho statute was so construed by the Circuit Court of Appeals for the Ninth Circuit in United States Fidel. & Guar. Co. *v.* Fort Misery Highway Dist., 22 F. (2d) 369, 373, and in Empire State-Idaho Mining & Developing Co. *v.* Hanley, 136 Fed. 99. See also Calif. Code Civ. Proc., sec. 942; Meredith *v.* Santa Clara Mining Ass'n of Baltimore, 60 Calif. 617, 619; Hitchcock *v.* Caruthers, 100 Calif. 100, 103, 34 Pac. 627; Hawley *v.* Gray Bros. Artificial Stone Paving Co., 127 Calif. 560, 561, 60 Pac. 437. The California provision was the prototype for the Idaho statute in question. See Naylor and Norlin *v.* Lewiston & S. E. Elec. Ry. Co., 14 Idaho 722, 725, 95 Pac. 827. Compare Hartford Accident & Indemnity Co. *v.* Bunn, 285 U. S. 169; Capital National Bank v. Board of Supervisors, 286 U. S. 550; Fidelity Union Casualty Co. *v.* Hanson, 287 U. S. —; Louisville & Nashville R. R. Co. *v.* Parker, 287 U. S. —; Toledo Scale Co. *v.* Computing Scale Co., 281 Fed. 488, affirmed 261 U. S. 399.

proceedings culminating in that judgment were these. On June 26, 1930, three days after the entry by the Idaho district court of judgment against the Surety Company on the supersedeas bond, it filed a motion in that court to vacate and set aside the judgment. The grounds there urged in support of the motion were wholly state grounds. They were that the judgment was void, because there had been no breach of condition of the bond, properly construed; that the judgment had been entered without notice to either the Surety Company or the Singer Company; and that the enforcement of the judgment would be contrary to good conscience and equity. After hearing arguments on the motion, the Idaho district court ordered that the judgment be vacated and set aside, and that the execution issued pursuant thereto be quashed. The Baldwins appealed to the Supreme Court of Idaho; and upon the presentation of their appeal no federal question was raised by either party. The Supreme Court, on May 2, 1931, reversed the order vacating the judgment. It declared that the only issue before the trial court on motion to vacate was its own jurisdiction to render the judgment against the Surety Company on the supersedeas undertaking; that such jurisdiction existed by virtue of the Surety Company's execution of the undertaking in the cause; that the question which had necessarily been presented was: "Did the Surety Company, in its undertaking, become a party liable for every part of the judgment appealed from which might be affirmed by the supreme court, or did it stipulate only as to such judgment or part thereof as might be affirmed against the Singer Sewing Machine Company"; that the trial court thus had the power and duty to construe the bond; that "whether it decided right or wrong its decision was a judgment which could be reviewed for error, if there was error, only by" the Supreme Court on appeal; and that the alleged error could not be raised on motion to vacate. 50 Idaho 609, 614-616.

The Surety Company petitioned for a rehearing. In that petition, besides reiterating several of its previous contentions, it urged, for the first time, that the rendition of the judgment on its undertaking violated the due process clause of the Fourteenth Amendment.[3] The petition was denied without opinion. The fed-

[3]The petition to this Court for a writ of certiorari, although filed October 30, 1931, was not granted until April 25, 1932, 286 U. S. 536, action thereon being withheld "awaiting the action of the Supreme Court of Idaho in the matters pending before it." Journal Sup. Ct., October Term 1931, p.

eral claim there made cannot serve as the basis for review by this Court. The contention that a federal right had been violated rests on the action of the trial court in entering judgment without giving notice and an opportunity to be heard. The same ground of objection had been raised throughout the proceedings but solely as a matter of state law. There had been ample opportunity earlier to present the objection as one arising under the Fourteenth Amendment. Compare *Corkran Oil Co.* v. *Arnaudet*, 199 U. S. 182, 193; *Godchaux Co.* v. *Estopinal*, 251 U. S. 179, 181; *Live Oak Water Users' Ass'n* v. *Railroad Comm.*, 269 U. S. 354, 357. This is not a case where, as in *Saunders* v. *Shaw*, 244 U. S. 317, 320, the federal claim arose from the unanticipated disposition of the case at the close of the proceedings in the state Supreme Court. Compare *Ohio ex rel. Bryant* v. *Akron Metropolitan Park Dist.*, 281 U. S. 74, 79. Nor is the federal claim based, as in *Brinkerhof-Faris Trust & Savings Co.* v. *Hill*, 281 U. S. 673, 678, upon the unanticipated act of the state Supreme Court in giving to a statute a new construction which threatened rights under the Constitution. Compare *Missouri ex rel. Missouri Insurance Co.* v. *Gehner*, 281 U. S. 313, 320.

*Second.* In No. 21, the Circuit Court of Appeals should have affirmed the decree of the federal court for Idaho which denied the Surety Company's application for an interlocutory injunction and dismissed the bill. For the federal remedy was barred by the proceedings taken in the state court which ripened into a final judgment constituting *res judicata*.

The Surety Company was at liberty to resort to the federal court regardless of citizenship, because entry of the judgment without notice, unless authorized by it, violated the due process clause of the Fourteenth Amendment, compare *National Exchange Bank* v. *Wiley*, 195 U. S. 257; *Cooper* v. *Newell*, 173 U. S. 555.

163 (Jan. 11, 1932). The actions referred to were two further steps taken by the Surety Company in the Idaho courts to be relieved of the original judgment against it. The first was a motion to correct, amend and vacate the original judgment. This motion the trial court overruled, and its order was upheld on appeal to the Supreme Court of Idaho. — Idaho —, 13 P. (2d) 650, decided July 12, 1932, rehearing denied September 10, 1932. The second was a direct appeal to the Supreme Court of Idaho from the original judgment; this appeal was dismissed because taken more than 90 days after the entry of the judgment appealed from. — Idaho —, 8 P. (2d) 461, decided February 21, 1932.

And it was at liberty to invoke the federal remedy without first pursuing that provided by state procedure. *Simon* v. *Southern Ry.*, 236 U. S. 115; *Atchison, Topeka & Santa Fe Ry. Co.* v. *Wells*, 265 U. S. 101; *The Firestone Tire & Rubber Co.* v. *Marlboro Cotton Mills*, 282 Fed. 811, 814. But an adequate state remedy was available; and having invoked that and pursued it to final judgment, the Surety Company cannot escape the effect of the adjudication there. Compare *Mitchell* v. *First National Bank*, 180 U. S. 471, 480-481; *Lion Bonding Co.* v. *Karatz*, 262 U. S. 77, 90.

The Supreme Court of Idaho had jurisdiction over the parties and of the subject matter in order to determine whether the trial court had jurisdiction. Clearly, the motion to vacate, made on a general appearance, and the appeal from the order thereon, were no less effective to confer jurisdiction for that purpose than were the special appearance and motion to quash and dismiss held sufficient in *Baldwin* v. *Iowa State Traveling Men's Assn.*, 283 U. S. 522. And there was an actual adjudication in the state court of the question of the judisdiction of the trial court to enter judgment. The scope of the issues presented involved an adjudication of that issue. Compare *Napa Valley Elec. Co.* v. *Railroad Comm.*, 251 U. S. 366; *Grubb* v. *Public Utilities Comm.*, 281 U. S. 470, 477-478. The Supreme Court of Idaho did not refuse to adjudicate that question when it declined to "construe the legal effect of the undertaking in question further than to examine it in aid of determining the sole question of the court's jurisdiction to hear and determine the motion for judgment thereon." It narrowed the issue, according to the State procedure, by separating, in effect, the question of jurisdiction from that of liability. It held that the status of the Surety Company as a party to the litigation, by virtue of its execution of the bond in the cause, necessarily persisted, although its liability may have been limited by the terms of the bond. With the soundness of the decision we are not here concerned. It is enough that the court did not, as the Surety Company asserts, reach its decision by merely assuming the point in issue, or by deeming itself concluded by the fact that the trial court took jurisdiction. That it did not so reach its decision is made clear by the opinion itself. We are thus brought to a consideration of the effect on the present suit of the judgment of the Supreme Court of Idaho.

The full faith and credit clause, together with the legislation pursuant thereto, applies to judicial proceedings of a state court drawn in question in an independent proceeding in the federal courts. Act of May 26, 1790, c. 11; Act of March 27, 1804, c. 56, § 2; Rev. Stat. § 905; *Mills* v. *Duryee*, 7 Cranch 481, 485; *Insurance Co.* v. *Harris*, 97 U. S. 331, 336. Compare *Bradford Electric Light Co.* v. *Clapper*, 286 U. S. 145, 155. The principles of *res judicata* apply to questions of jurisdiction as well as to other issues. *Baldwin* v. *Iowa State Traveling Men's Assn.*, 283 U. S. 522. They are given effect even where the proceeding in the federal court is to enjoin the enforcement of a state judgment, if the issue was made and open to litigation in the original action, or was determined in an independent proceeding in the state courts. See *Marshall* v. *Holmes*, 141 U. S. 589, 596; *Fidelity & Deposit Co. of Maryland* v. *Gaston, Williams & Wigmore*, 13 F. (2d) 267, aff'd per curiam, *id.*, 268.[4] The principles of *res judicata* may apply, although the proceeding was begun by motion. Thus, a decision in a proceeding begun by motion to set aside a judgment for want of jurisdiction is, under Idaho law, *res judicata*, and precludes a suit to enjoin enforcement of the judgment. *Bernhard* v. *Idaho Bank & Trust Co.*, 21 Idaho 598, 123 Pac. 481.[5] Since the

[4]In Wells Fargo & Co. v. Taylor, 254 U. S. 175, the petitioner had not been allowed to become a party to the prior litigation in the state court.

[5]The opinion in that case makes it clear that the effect of the prior judgment as a bar does not rest merely on a rule of practice or, where the second proceeding is in equity, on the adequacy of the remedy at law. The court said: "In this state the appellant had a choice between two remedies, and he chose to file his motion to vacate the judgment in the case in which the judgment was rendered upon the same facts as pleaded in the complaint in the action involved, and the court, after hearing the motion, decided the facts against the appellant, holding that the judgment was not void, and the order so holding was appealable. But appellant refused to exercise his right of appeal and brought this suit in equity to enjoin the collection of said judgment. He had his day in court in that action, and the decision of that motion upon the question of jurisdiction was *res adjudicata*. The appellant had the right either to attack said judgment by motion in the original case or by bringing this action to enjoin or to have it set aside. If he proceeded by motion, and the court decided against him, the decision of that question, until reversed upon appeal, is final and binding on the parties." 21 Idaho 598, 603-604.

Compare the effect, under Idaho law, of a decision on a motion to set aside a judgment because of the mistake, inadvertence, or excusable neglect

decision would formally constitute *res judicata* in the courts of the state; since it in fact satisfies the requirements of prior adjudication; and since the constitutional issue as to jurisdiction might have been presented to the state Supreme Court and reviewed here, the decision is a bar to the present suit insofar as it seeks to enjoin the enforcement of the judgment for want of jurisdiction. Compare *Fidelity Natl. Bank & Trust Co.* v. *Swope,* 274 U. S. 123, 130-131.

*Third.* The Surety Company contends in No. 21 that even if the trial court of the State had jurisdiction, the federal district court may enjoin the enforcement of the judgment on the ground that having been entered without notice and an opportunity for a hearing on the construction of the bond, it lacked due process of law. It is true that entry of judgment without notice may be a denial of due process even where there is jurisdiction over the person and subject matter. But that rule is not applicable here. For if the bond properly construed stayed the judgment as against Anderson, the Surety Company consented to the entry of judgment against it without notice for his failure to pay. If the bond did not stay the judgment as against Anderson, the trial court confessedly erred in entering the judgment on the bond. In order to contest its liability the Surety Company had the constitutional right to be heard at some time on the construction of the bond. The state practice provided the opportunity for such a hearing by an appeal after the entry of judgment.

The practice prescribed was constitutional. Due process requires that there be an opportunity to present every available defense; but it need not be before the entry of judgment. *York* v. *Texas,* 137 U. S. 15. Compare *Grant Timber & Manufacturing Co.* v. *Gray,* 236 U. S. 133; *Bianchi* v. *Morales,* 262 U. S. 170. See

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of the defendant, or to allow an answer to the merits to be interposed after judgment where summons was not served personally on the defendant. Motions of this kind are allowed by express statute. Idaho Comp. Stat., sec. 6726. They present a matter for judicial discretion, Mortgage Co. Holland America *v.* Yost, 39 Idaho 489, 228 Pac. 282; and their determination does not bar a renewal motion. See Dellwo *v.* Petersen, 34 Idaho 697, 203 Pac. 472. But motions of this kind are to be distinguished from those attacking the judgment as void for want of jurisdiction. Armitage *v.* Horseshoe Bend Co., Ltd., 35 Idaho 179, 204 Pac. 1073; Shumake *v.* Shumake, 17 Idaho 649, 107 Pac. 42.

also *Phillips* v. *Commissioner,* 283 U. S. 589, 596-597; *Coffin Brothers* v. *Bennett,* 277 U. S. 29. An appeal on the record which included the bond afforded an adequate opportunity. Thus, the entry of judgment was consistent with due process of law. We need not enquire whether its validity may not rest also on the ground that the Surety Company, by giving the bond, must be taken to have consented to the State procedure. Compare *United Surety Co.* v. *American Fruit Product Co.,* 238 U. S. 140, 142; *Corn Exchange Bank* v. *Commissioner,* 280 U. S. 218, 223. The opportunity afforded by state practice was lost because the Surety Company inadvertently pursued the wrong procedure in the state courts. Instead of moving to vacate, it should have appealed directly to the state Supreme Court. When later it pursued the proper course the time for appealing had elapsed. The fact that its opportunity for a hearing was lost because misapprehension as to the appropriate remedy was not removed by judicial decision until it was too late to rectify the error does not furnish the basis for a claim that due process of law has been denied. Compare *O'Neil* v. *Northern Colorado Irrigation Co.,* 242 U. S. 20, 26. Having invoked the state procedure which afforded the opportunity of raising the issue of lack of notice, the Surety Company cannot utilize the same issue as a basis for relief in the federal court. Federal claims are not to be prosecuted piecemeal in state and federal courts, whether the attempt to do so springs from a failure seasonably to adduce relevant facts, as in *Grubb* v. *Public Utilities Commission,* 281 U. S. 470, 479, or from a failure seasonably to pursue the appropriate state remedy.[6]

*In No. 3, writ of certiorari dismissed.*
*In No. 21, decree reversed.*

[6]The cases are many in which failure to comply with state rules of practice has prevented this Court from considering a federal claim on direct review. See *e. g.* cases where the claim was not considered by the highest court of the State because it was not raised by the proper procedure, Brown *v.* Massachusetts, 144 U. S. 573, 580; Hulbert *v.* Chicago, 202 U. S. 275, 281; or by the proper pleadings, Atlantic Coast Line R. R. *v.* Mims, 242 U. S. 532, 535-537; Nevada-California-Oregon Ry. *v.* Burrus, 244 U. S. 103, 104-105; or was not raised at the proper stage of the proceedings, Spies *v.* Ilinois, 123 U. S. 131, 181; Baldwin *v.* Kansas, 129 U. S. 52, 56-57; Jacobi *v.* Alabama, 187 U. S. 133; Layton *v.* Missouri, 187 U. S. 356; Louisville & Nashville R. R. Co. *v.* Woodford, 234 U. S. 46, 51; Missouri Pacific Ry. Co. *v.* Taber, 244 U. S. 200, 201-202; Missouri, Kansas & Texas Ry. Co. *v.* Sealey, 248 U. S. 363, 365; Barbour *v.* Georgia, 249 U. S. 454, 460; Hartford Life Ins. Co. *v.* Johnson, 249 U. S. 490, 493-494; compare Michigan Central R. R. Co. *v.* Mix, 278 U. S. 492, 496.